(16,216.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 143.

WILLIAM W. CONDE AND JOHN C. STREETER, PLAINTIFFS IN ERROR,

vs.

ANSON E. YORK AND WALLACE W. STARKWEATHER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 16, 1897.

a STATE OF NEW YORK, }
Jefferson County. }

CLERK'S OFFICE.

I, Frank D. Pierce, clerk of the county of Jefferson and of all the courts of record in and for the said county and of the supreme court in and for the fourth judicial department in the county aforesaid, the same being a court of record, do hereby certify and return that the following are true and correct copies of the record, remittitur of court of appeals, judgment-roll, opinions of the court, writ of error and allowance thereof, citation and proof of service thereof, and of all the records and proceedings in the action of Anson E. York & William W. Starkweather against William W. Conde & John C. Streeter on file in said clerk's office, and that I have compared the same with the originals thereof on file as aforesaid, and that the same are true and correct transcripts of said originals and of the whole thereof.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said county and court, at Watertown, N. Y., this 28th day of January, 1896.

[Seal Jefferson County.]

FRANK D. PIERCE, *Clerk.*

b UNITED STATES OF AMERICA:

The President of the United States to the honorable justices of the supreme court of the State of New York in the fourth judicial department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, before you or some of you, on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, remitting to you or some of you the final decree or judgment of said court to be enforced in the suit between Anson E. York and Wallace W. Starkweather, plaintiffs, and William W. Conde and John C. Streeter, defendants, wherein the said William W. Conde and John C. Streeter specially set up and claimed a title, right, privilege, and immunity under and by virtue of a statute of the United States, viz., that the said William W. Conde and John C. Streeter were entitled under and by virtue of section 3477 of the Revised Statutes of the United States to take, hold, and retain moneys in their hands amounting to upwards of twenty-five hundred dollars ($2,500) by reason that a pretended assignment thereof for a claim against the United States made by Witherby & Gaffney to Anson E. York and Wallace W. Starkweather was void by reason of the provisions of section 3477 of the Revised Statutes U. S. and by reason that the money claimed and property claimed to have been assigned to the said York & Starkweather by Witherby & Gaffney was at the time of the pretended assignment a claim against the United States which had not then

been allowed or the amount due thereon ascertained or the warrant issued for the payment thereof, and that the said pretended assignment did not recite the warrant for payment
c issued by the United States and is not acknowledged by the person making the same before an officer having authority to take acknowledgements of deeds and is not certified by such officer, and the decision was against the title, right, privilege, and immunity so specially set up and claimed, and that as between the said Anson E. York & Wallace W. Starkweather, claimants of the said fund, under and by virtue of an assignment from Witherby & Gaffney, who owned the same, as a part of the claim against the United States, and the said William W. Conde & John C. Streeter, who claimed to own the same by reason of the actual transfer and assignment thereof to them from the said Witherby & Gaffney after the allowance and payment thereof by the United States, the said William W. Conde and John C. Streeter could not by reason of the provisions of section 3477, U. S. R. S., successfully set up or claim any title, right, privilege, or immunity in relation to the said fund as against the said Anson E. York and Wallace W. Starkweather, it being claimed that a manifest error hath happened, to the great damage of the said William W. Conde and John C. Streeter, as is said and as appears by their complaint, we, being willing that said error should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be thereby given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 24th day of February next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause what further to be done
d therein to correct the error that *all* right and according to the law and custom of the United States ought be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of January, in the year of our Lord 1896, and of the Independence of the United States the 120th.

[L. S.] W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States for the Northern District of New York, in the Second Circuit.

ELON R. BROWN,
Attorney for Plaintiffs in Error, Watertown, N. Y.

The foregoing is a copy of a writ of error granted in the above-entitled action and filed in Jefferson county clerk's office this 27th day of January, 1896.

Yours, &c., ELON R. BROWN,
Attorney for Plaintiffs in Error, Watertown, N. Y.

Allowed.
CHAS. ANDREWS,
Chief Judge Court of Appeals, New York.

e UNITED STATES OF AMERICA, *ss:*

To Anson E. York & Wallace W. Starkweather, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the Capitol, in the city of Washington, on the 24th day of February, 1896, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York in and for the county of Jefferson, wherein William W. Conde and John C. Streeter are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Charles Andrews, chief judge of the court of appeals of the State of New York, this 25th January, in the year of our Lord 1896, and of the Independence of the United States the one hundred and twentieth.

——— ———.

Allowed.

CHAS. ANDREWS,
Chief Judge Court of Appeals, New York.

Due personal service upon me of a copy of the within citation, at the city of Watertown, Jefferson county, N. Y., is admitted this 27 day of January, 1896.

HENRY PURCELL,
Attorney for Defendants in Error, Watertown, N. Y.

f STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 26th day of November, in the year of our Lord one thousand eight hundred and ninety-five, before the judges of said court.

Witness the Hon. Charles Andrews, chief judge, presiding. Gorham Parks, clerk.

Remittitur, November 27th, 1895.

ANSON E. YORK & WILLIAM W. STARKWEATHER, Respondents,
ag'st
WILLIAM W. CONDE & JOHN C. STREETER, Appellants.

Be it remembered that on the 4th day of January, in the year of our Lord one thousand eight hundred and ninety-four, William W. Conde and John C. Streeter, the appellants in this action, came here into the court of appeals, by Brown & Adams, Esqrs., & Watson M. Rogers, Esq., their attorneys, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of

the supreme court of the State of New York; and Anson E. York and William W. Starkweather, the respondents in said action, afterwards appeared in said court of appeals, by Henry Purcell, Esq., their attorney; which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

g Whereupon the said court of appeals, having heard this cause argued by Mr. Elon R. Brown, of counsel for the appellants, and by Mr. Henry Purcell, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed; and it was further ordered and adjudged that the respondents recover against the appellants costs of appeal to this court; and it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed with costs, as aforesaid, and stand in full force, strength, and effect.

And hereupon as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted in the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals.

CLERK'S OFFICE, ALBANY, *Nov. 27th*, 1895.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] GORHAM PARKS, *Clerk.*

h STATE OF NEW YORK:

Court of Appeals.

At a term of said court held at the capital, in the city of Albany, on the 24th day of January, 1896.

Present: Hon. Charles Andrews, chief judge, presiding.

ANSON E. YORK & ANO., Respondents,
vs.
WILLIAM W. CONDE & ANO., Appellants.

A motion having heretofore been made to amend the remittitur heretofore issued in this action and after due deliberation thereupon had—

Ordered that the said motion be, and the same is, granted and

the said remittitur hereby corrected and amended by striking out the following words therein: "And, after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed," and by substituting for the words so stricken out the following, viz: "And the said appellants having specially set up and claimed that they were entitled under section 3477 of the Revised Statutes of the United States to hold and retain the sum of twenty-five hundred dollars ($2,500.00), for which amount this action was brought, on the ground that under said section the assignment thereof to the respondents was void, and after due deliberation had thereon, the said court of appeals, having passed upon the said claim of the appellants, did order and adjudge that the said appellants were not entitled to the said twenty-five hundred dollars ($2,500.00) under the said statute, and that the assignment to the respondents was valid; and did order and adjudge that the judgment of the
i court appealed from in this action be in all things affirmed;" and the said remittitur upon the entry of this order shall stand so amended and this order shall become a part of the said remittitur.

A copy.

[L. s.] GORHAM PARKS, *Clerk.*

Entered Jan'y 27, 1896, at 5 p. m.

W. W. KELLEY, *Dep. Clerk.*

To Henry Purcell, respondents' attorney:

Take notice that an order, of which the foregoing is a copy, is this day entered in the Jefferson county clerk's office.

Dated January 27, 1896.

Yours, &c., ELON R. BROWN,

Appellants' Attorney, 10½ *Washington St., Watertown, N. Y.*

j Court of Appeals.

ANSON E. YORK and WALLACE W. STARKWEATHER, Respondents,
against
WILLIAM W. CONDE and JOHN C. STREETER, Appellants.

Papers on Appeal.

From judgment.

Henry Purcell, respondents' attorney, Watertown, N. Y.

Brown & Adams, attorneys for appellant Conde, Watertown, N. Y.

Watson M. Rogers, attorney for appellant Streeter, Watertown, N. Y.

1 STATE OF NEW YORK:

In Supreme Court, General Term, Fourth Department.

STATE OF NEW YORK, *County of Jefferson,* } ss:

I, Frank D. Pierce, clerk of the county of Jefferson, and of the supreme and county courts held therein, do hereby certify that I have compared the following copies of notices of appeal, judgment-roll, case and exceptions with the originals on file in this office, and that the same are true and correct copies thereof, and of the whole of said originals.

Witness my hand and seal of office this 1st day of September, 1893.

[L. S.] F. D. PIERCE, *Clerk.*

Supreme Court, County of Jefferson.

ANSON E. YORK and WALLACE W. STARKWEATHER, Plaintiffs,
against
WILLIAM W. CONDE and JOHN C. STREETER, Defendants.

GENTLEMEN: Please take notice, that the defendant Conde
2 in the above-entitled action appeals to the general term of the supreme court from the judgment of the circuit court, and the order denying motion for a new trial herein entered in the clerk's office of the county of Jefferson, on the 22d day of March, 1893, in favor of plaintiffs, against the said defendants, for $3,370.64, and from the whole of said judgment and order.

Dated at Watertown, N. Y., April 19, 1893.

Yours, &c., BROWN & ADAMS,
Attorney- for Defendant Conde, 10½ *Washington St.,*
Watertown, N. Y.

To the clerk of the county of Jefferson and to Henry Purcell, Esq.

Endorsed: "Filed April 19th, 1893."

Supreme Court, County of Jefferson.

ANSON E. YORK and WALLACE W. STARKWEATHER, Plaintiffs,
against
WILLIAM W. CONDE and JOHN C. STREETER, Defendants.

GENTLEMEN: Please take notice, that the defendant Streeter in the above-entitled action appeals to the general term of the supreme court from the judgment of the circuit court, and the order denying motion for a new trial herein entered in the clerk's office of the

county of Jefferson, on the 22d day of March, 1893, in favor
3 of plaintiffs, against the said defendants, for $3,370.64, and from the whole of said judgment and order.

Dated at Watertown, N. Y., May 4, 1893.

Yours, &c., WATSON M. ROGERS,
Attorney for the Defendant Streeter, 16 *Washington Street, Watertown, N. Y.*

To the clerk of the county of Jefferson and to Henry Purcell, Esq.

Endorsed: "Filed May 4, 1893."

In Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STAR-WEATHER
against
WILLIAM W. CONDE and JOHN C. STREETER.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trail to be held in the county of Jefferson.

Dated this 10th day of July, 1890.

HENRY PURCELL,
Plaintiffs' Attorney.

Office and P. O. address, 20 and 22 Flower building, Watertown, N. Y.

4 In Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STARKWEATHER
against
WILLIAM W. CONDE and JOHN C. STREETER.

The plaintiffs, for cause of action against the defendants, allege that at the several times hereinafter referred to they, the said plaintiffs, were and still are copartners in business at the city of Watertown, N. Y., under the firm name and style of York & Starkweather.

That in or about the month of September, 1889, James L. Witherby and James Gaffney, who then and at all times hereinafter referred to, were copartners in the contracting and building business at Watertown, N. Y., and elsewhere under the firm name and style of Witherby & Gaffney, entered into an agreement and contract with the United States Government, by the terms of which they were to furnish all materials and construct certain buildings for the said Government to be known as "officers' quarters," at Madison barracks, Sacket's Harbor, Jefferson county, N. Y.

That thereafter and prior to March 27th, 1890, the plaintiffs, at the request of said Witherby & Gaffney, sold and delivered to them large quantities of lumber and building materials for use by them and which were used by them in the construction and erection of the said buildings for the United States Government, and on the day last aforesaid there was due and owing the plaintiffs from said Witherby & Gaffney on account of said lumber and materials sold to them as aforesaid, the sum of three thousand dollars and over, and the said Witherby & Gaffney on that day in order to pay and secure to be paid to the plaintiffs three thousand dollars of their said indebtedness to plaintiffs, made, executed and delivered to the said plaintiffs an instrument in writing of which the following is a copy:

"Whereas, we have a contract with the United States Government for the construction of buildings and officers' quarters at Madison barracks, Sacket's Harbor, Jefferson county, N. Y.

"And whereas we are indebted to York & Starkweather, of Watertown, N. Y. in the sum of three thousand dollars and more on account of materials furnished us by them that were used in said buildings and quarters.

"And whereas there will be due and payable to us on account of our work, etc., from the Government considerable sums of money before and on the completion of our said work.

"Now, therefore, of the moneys due and to become due us from the said Government we do hereby for value received assign and transfer to said York & Starkweather the sum of three thousand dollars, and do hereby authorize, empower, request and direct Lieut. J. E. Macklin, R. Q. M. Eleventh infantry, U. S. A., through whom payments are made for such construction, to pay to said York & Starkweather on our account for such construction the full sum of three thousand dollars, as follows: First, $500 from the next estimate and payment due or to become due us, and the sum of $2,500 on the completion of said work by us, and when the balance of our contract with the Government becomes due and payable to us.

"Dated March 27th, 1890.

"WITHERBY & GAFFNEY. [L. S.]

"Signed, sealed and delivered in the presence of
"ORRIN J. ROBINSON.
"IRA GARDNER."

That thereafter and on or about the 2d day of April, 1890, the said Witherby & Gaffney paid to apply on their said indebtedness to the plaintiffs the sum of five hundred dollars, and no other payments have been made by them on account thereof.

That on or about May 15, 1890, the said Witherby & Gaffney had furnished and completed their said contract with the said Government, and there was on that day due and owing them from the said Government the sum of about $4,300 on account thereof, and $2,500 of said sum was then the money and property of the plaintiffs by

virtue of the said instrument of assignment executed and delivered to them by said Witherby & Gaffney, as aforesaid, but the officers and agents of the said Government refused to pay the plain-
6 tiffs the said sum of $2,500 on account thereof, and on the same day, to wit: May 15, 1890, it, the said Government, by and through its officers and agents, paid to said Witherby & Gaffney the whole of said sum due and owing them from it, as aforesaid.

That immediately after payment of said moneys to said Witherby & Gaffney, plaintiffs duly demanded that they pay to them from said moneys the sum of $2,500, which had been assigned to them as aforesaid, and of which they were the lawful owners, and said Witherby & Gaffney refused to pay the same or any part thereof.

That thereafter, and on or about the same day, to wit: May 15, 1890, the said Witherby & Gaffney paid over and delivered to the defendants in this action the whole of said sum of about $4,300, which was paid to them on that day by the Government, as aforesaid.

That before such payment and delivery of said moneys to the defendants by said Witherby & Gaffney the plaintiffs duly notified the defendants that they held an assignment and were the owners of $2,500 of said moneys, and the said defendants accepted and received the said moneys from the said Witherby & Gaffney with full notice of the plaintiffs' said assignment of $2,500 thereof.

And of their rights and interests therein and thereto and appropriated the same and the whole thereof to their own use and benefit.

That on or about May 16, 1890, and while the said defendants still had in their possession the moneys paid and delivered to them by the said Witherby & Gaffney, or the check or checks, draft or drafts representing said money, and which had come to them from said Witherby & Gaffney, the plaintiffs duly demanded of them, the said defendants, that they pay and deliver to said plaintiffs from said moneys, check or checks, draft or drafts, the sum of $2,500. And the defendants refused to pay or deliver the same or any part thereof to the plaintiffs, but appropriated the same and the whole thereof to their own use and benefit.

Wherefore, plaintiffs demand judgment against the de-
7 fendants and each of them for two thousand five hundred dollars, with interest thereon from May 15, 1890, besides the cost of this action.

HENRY PURCELL,
Plaintiffs' Attorney, 20 and 22 Flower Building,
Watertown, N. Y.

JEFFERSON COUNTY, } ss:
City of Watertown, }

Anson E. York, being duly sworn, says he is one of the plaintiffs named in the foregoing complaint, that said complaint is true to the knowledge of deponent, except as to the matters therein stated

to be alleged on information and belief, and that as to those matters he believes it to be true.

ANSON E. YORK.

Sworn to before me July 11, 1890.

J. N. CARLISLE,
Commissioner of Deeds, City of Watertown, N. Y.

In Supreme Court, Jefferson County.

ANSON E. YORK and Ano.
vs.
WILLIAM W. CONDE and Ano.

The defendant Conde, answering the complaint in this action, denies any knowledge or information sufficient to form a belief that Witherby & Gaffney made, executed and delivered to the plaintiffs the instrument in writing purporting to be an assignment of the claim of Witherby and Gaffney to the extent of twenty-five hundred dollars ($2,500) as set forth in said complaint, and denies that the said twenty-five hundred dollars ($2,500) or any other moneys or claim were assigned to plaintiffs or became the property of plaintiffs from the said Witherby and Gaffney as assignors or otherwise.

8 This defendant denies that said Witherby and Gaffney paid over to the defendants the whole of the sum of about forty-three hundred dollars ($4,300) as alleged in the complaint, and this defendant alleges upon information and belief that at the time the said Witherby and Gaffney entered into the contract and agreement with the United States referred to in the complaint, and on or about Sep. 9, 1889, this defendant signed, executed and delivered to the United States a bond in the penal sum of thirty-six hundred dollars ($3,600) conditioned for the faithful performance by said Witherby & Gaffney of the terms of their said contract with the United States, and that in default thereof the United States might perform the same and hold this defendant for the loss and damage occasioned by the failure of the said contractors to perform the same; and that this defendant would protect and save harmless the United States any and every default in the performance of said contract of the said Witherby & Gaffney. The execution and delivery of the said bond was a necessary condition of the awarding of the said contract to the said Witherby & Gaffney.

That said Witherby & Gaffney were men of small means and limited credit, and after they entered upon the performance of their contract, being in need of funds to carry on the same, they applied to this defendant as surety aforesaid and requested him to assist them in raising necessary funds to pay for labor and materials necessary to complete the said contract, and the said Witherby & Gaffney being otherwise unable to complete the said contract, this defendant did, in pursuance of the said request, sign and endorse divers promissory notes made by said Witherby & Gaffney, to enable them by the discount thereof to raise the money to complete said

contract, and this defendant continued so to do until the completion of said contract. That after March 1, 1890, and up to the completion of the said contract the notes which defendant had endorsed, as aforesaid, amounted at all times to upward of four thousand dollars ($4,000), and before the endorsement thereof and before the execution of the pretended assignment to the plaintiffs, described in the complaint, the said Witherby & Gaffney promised and agreed with this defendant as a condition of the endorsements to
9 pay over, transfer and assign to this defendant the said contract with the United States Government and all moneys to become due thereon to be applied to the payment of the said notes and to hold the said contract and moneys due or to become due thereon subject to a charge or lien in favor of this defendant to the extent of notes endorsed and moneys advanced as aforesaid to the said Witherby & Gaffney to enable them to perform the said contract.

That on or about April 16, 1890, the said Witherby and Gaffney then applied to this defendant for a further endorsement to the amount of five hundred dollars ($500), and in pursuance of and as evidence of the agreement aforesaid to devote the moneys arising from such contract to discharge this defendant's liability as an endorser, and as a condition of such further endorsement signed, executed and delivered to this defendant, and his codefendant Streeter, the following assignment, to wit:

"WATERTOWN, *Apr.* 18, 1890.

"In consideration Jno. C. Streeter and Wm. W. Conde endorsing note for $500 this day, we agree upon receipt of check which we receive from Lieut. Macklin, for the amount due us, about $4,500, we agree to pay sufficient on notes in Jeff. Co. bank to reduce them to seventeen hundred dollars, and to pay Jno. C. Streeter, individually, $350, and to pay Wm. W. Conde, individually, $250, to apply on their separate accounts and contingent liabilities.

WITHERBY & GAFFNEY."

The said Streeter had likewise endorsed the same notes which this defendant had endorsed for the accommodation of said Witherby & Gaffney.

The moneys and claim and the said assignment referred to as the subject thereof, and the notes therein provided for to be paid, are the same moneys and claim belonging to said Witherby & Gaffney, which are the subject of controversy in this action, and the notes are the same as endorsed by this defendant aforesaid.

And that in further performance of the said understanding and agreement to devote the moneys arising from such contract and the payment of said notes, and to make more explicit the paper
10 of April 16, 1890, above set forth, the said Witherby & Gaffney made, executed and delivered to this defendant and his codefendant Streeter the following assignment, to wit:

"WATERTOWN, *Apr.* 18, 1890.

"That there may be no misunderstanding about the intention of the foregoing agreement, we hereby assign for value received to John C. Streeter and Wm. W. Conde sufficient of the moneys coming to us from Lieut. Macklin, R. Q. M., to pay the claims as specified in the foregoing agreement.

WITHERBY & GAFFNEY."

The defendant further alleges that in pursuance of the said agreement made by the said Witherby & Gaffney to pay over to this defendant for application upon said notes endorsed by him, all moneys arising from such contract with the United States, and to hold the same subject to a charge and lien for the payment of the same, said Witherby & Gaffney did, on or about May 15, 1890, pay over to the defendants in this action the sum of about thirty-seven hundred dollars ($3,700). And the defendants forthwith applied the said moneys to the payment of notes of about that amount given by the said Witherby & Gaffney and endorsed by the defendants as aforesaid, and the said moneys so applied are the same moneys which are the subject of controversy in this action.

The defendant further alleges that at the time he made the endorsements aforesaid and entered into the said agreement with Witherby & Gaffney for the assignment of the moneys arising on the said contract and for a lien thereon, and at the time of the execution of the said assignment aforesaid from Witherby & Gaffney to defendants, this defendant had no knowledge or notice whatsoever that the plaintiffs had, or claimed to have, any interest in the said Government contract or the moneys to be paid thereon.

Second.

This defendant repeats in this answer the denials contained in the foregoing answer, and alleges that the money claim and property claimed by the plaintiffs in this action to have been assigned to them by Witherby & Gaffney at the time of the pretended
11 assignment thereof constituted and was a claim against the United States Government, which had not then been allowed, or the amount due thereon ascertained, or the warrant issued for the payment thereof, and that the pretended assignment thereof does not recite the warrant for payment issued by the United States, and is not acknowledged by the person making the same before an officer having authority to take acknowledgments of deeds, and is not certified by such officer; and that said pretended assignment is in violation of the laws of the United States and of the State of New York, and that the plaintiffs never derived any interest in the said contract with the United States by virtue of the said pretended assignment or otherwise, and are not the real parties in interest in this action and ought not therefore to maintain the same; that said Witherby & Gaffney never transferred any interest in the said contract to the said plaintiffs.

BROWN & ADAMS,
Defendants' Attorneys.

JEFFERSON COUNTY, *ss:*

William W. Conde, being duly sworn, says that he is the defendant named in the foregoing answer, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

W. W. CONDE.

Subscribed and sworn before me Sept. 10, 1890.

J. NELLIS,
Notary Public.

In Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STARKWEATHER
vs.
WILLIAM W. CONDE and JOHN C. STREETER. } Answer.

I.

12 The defendant, John C. Streeter, for himself separately answering the complaint herein, denies any knowledge or information sufficient to form a belief whether James L. Witherby and James Gaffney made, executed and delivered to plaintiffs an instrument in writing, purporting to be an assignment of a claim of said Witherby & Gaffney to the extent of $2,500, as set forth in said complaint; and on information and belief he denies that the said $2,500, or any part thereof, or any claim, were thereby assigned to plaintiffs, or became the property of plaintiffs from the said Witherby & Gaffney as assignors, or otherwise; and he denies that the said Witherby & Gaffney paid over to the defendants the whole of the sum of $4,300 at the time and as alleged in the complaint, or at any other time or in any other manner.

II.

The said defendant, for a second and further separate answer and defense herein, alleges that at the time the said Witherby & Gaffney entered into the agreement and contract with the United States referred to in the complaint, they, the said Witherby & Gaffney, were and ever since have been men of small means and limited credit; that after entering upon the performance of their said contract with the Government of the United States, being in need of funds to carry on the same, they applied to defendants and requested the defendants to assist them in raising funds for labor and materials necessary to complete the said contract, they, the said Witherby & Gaffney, being otherwise unable to complete the same; and these defendants thereupon, in pursuance of the said request, separately advanced certain moneys, and together signed and endorsed divers promissory notes made by the said Witherby & Gaffney, to enable them, by the discount thereof, with said advances, to raise the money necessary to complete said contract; and the defendants, from time to time,

continued so to do until the completion thereof; and after March 1st, 1890, and down to the completion of the said contract, the moneys so advanced, and the notes which the defendants had endorsed and signed as aforesaid, amounted, at all times, to upwards of $4,000.

That before the signing and endorsement of said notes and
13 advancement of said moneys, and before the execution of the pretended assignment to the plaintiffs mentioned in the complaint, the said Witherby & Gaffney promised and agreed to and with the defendants, as a condition of the endorsement, to pay over, transfer and assign to them, (the defendants), the said contract with the United States Government and all the moneys to become due thereon, the same to be applied to the payment of the said notes and advances, and that the said defendants should have a lien and charge on said contract and all moneys to become due thereon as a security and indemnity in their favor to the extent of the notes signed and endorsed and the moneys advanced as aforesaid to and for the said Witherby & Gaffney to enable them to perform the said contract.

That on or about April 16, 1890, the said Witherby & Gaffney applied to defendants for further endorsement to the amount of $500, and in pursuance of and as evidence of the agreement aforesaid to devote the moneys arising from said contract to discharge the defendants' liability as endorsers and to give the defendants a lien and charge thereon, and as a condition of said further endorsement, signed, executed and delivered to the defendants an instrument in writing, of which the following is copy, to wit:

"WATERTOWN, *April* 16, 1890.

Consideration, John C. Streeter and William W. Condee, endorsing note for $500 this day, we agree, upon receipt of check which we receive from Lieut. Macklin for the amount due us, about $4,500, we agree to pay sufficient on notes in Jefferson County bank to reduce them to $1,700, and to pay John C. Streeter individually $350, and to pay William W. Condee individually $250 to apply on their separate accounts.

WITHERBY & GAFFNEY."

The moneys and claim in the said assignment referred to *is* the subject thereof, and the notes therein provided for to be paid are the same moneys and claim belonging to said Witherby & Gaffney, which are the subject of controversy in this action, and the notes are the same as endorsed by the defendants as aforesaid.

14 That in further performance of the said understanding and agreement and to devote the moneys arising from said contract to the payment of said notes and advances, and to make more explicit the paper of April 16, 1890, before set forth, the said Witherby & Gaffney made, executed and delivered to these defendants the following instrument, to wit:

"WATERTOWN, *April* 18, 1890.

That there may be no misunderstanding about the intention of the foregoing agreement, we hereby assign, for value received, to John C. Streeter and William W. Condee, sufficient of the moneys coming to us from Lieut. Macklin, Q. M., to pay the claims as specified in the foregoing agreement.

WITHERBY & GAFFNEY."

The defendant further alleges that in pursuance of the said parol and written agreements made by said Witherby & Gaffney to pay over to these defendants for application upon said notes endorsed by them, all moneys arising from said contract with the United States and to hold the same subject to a lien and charge for the payment of said notes, said Witherby & Gaffney did, on or about May 15, 1890, pay over and deliver to the defendants in this action the sum of about $3,700, and no more, and the defendants forthwith applied the said moneys to the payment of notes of about that amount given by said Witherby & Gaffney and endorsed by defendants as aforesaid, and the moneys so applied are the same moneys mentioned and set forth in the complaint, and were obtained as hereinbefore stated, and not other or different.

That at the time of making the endorsements aforesaid and entering into the said agreement with Witherby & Gaffney for a lien and charge upon and assignment of the moneys arising on said contract, and at the time of the execution of said assignment from Witherby & Gaffney to the defendants, this defendant had no knowledge or notice whatsoever, that the plaintiffs had, or claimed to have any interest in said Government contract, or the moneys to be paid thereon.

III.

15 The said defendant, for a third and separate answer and defense herein, on information and belief alleges that the money, claim and property claimed by the plaintiffs in this action to have been assigned to them by said Witherby & Gaffney at the time of the pretended assignment thereof to the plaintiffs, constituted, and was a claim against the United States Government, which had not then been allowed, nor the amount ascertained, nor the warrant issued for the payment thereof, and that the pretended assignment thereof does not recite the warrant for payment issued by the United States, and it is not acknowledged by the person making the same before an officer having authority to take acknowledgment of deeds, and is not certified by said officer, and that said pretended assignment to the plaintiffs is in violation of the laws of the United States and of the State of New York, and that the plaintiffs did not acquire, and have not acquired any interest in the said contract with the United States by virtue of the said pretended assignment, or otherwise, and are not the real parties in interest in this action, and ought not to have or maintain the same; that the said Witherby & Gaffney never transferred any interest in said con-

tract, nor the moneys arising, or to grow due, thereon to the said plaintiffs.

WATSON M. ROGERS,
Attorney for Def't Streeter.

STATE OF NEW YORK, } ss:
County of Jefferson, }

John C. Streeter. being duly sworn, deposes and says, that he is the defendant, who makes the foregoing answer in this action; that he has read the said answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JNO. C. STREETER.

Sworn to before me, this 4th day of October, 1890.
THOS. F. KEARNS,
Notary Public.

16 At a circuit court and court of oyer and terminer, held at the court-house, in the city of Watertown, in and for the county of Jefferson, on the 6th day of March, 1893.
Present: Hon. P. B. McLennan, justice.

Supreme Court.

ANSON E. YORK and Ano. *vs.* WILLIAM W. CONDE and Ano. } Henry Purcell, C. H. Walts. March 9, 1893. Brown & Adams, Watson M. Rogers.

Jurors.

A. L. Rogers,	Wayne B. Brewster,
Harley A. Stebbens,	S. L. Lyman,
O. H. Caswell,	Chas. W. Smith,
James Cline,	Peter Dorr,
Leman Tucker,	Edward Smith,
James Casselman,	Winfield S. Rogers.

Witnesses.

For plaintiffs.	For defendants.
Anson E. York.	William W. Conde,
	John C. Streeter.

S. M. Byam and T. T. Ballard sworn as officers.
Jury found a verdict for the plaintiffs for $2,921.25.

A copy.

GEO. H. COBB,
Deputy Clerk.

17 In Supreme Court, State of New York, *ss:*

At a circuit court and special term of the supreme court, held at the court-house in the city of Watertown, Jefferson county, N. Y.,

in and for the fifth judicial district of the State of New York on the 20th day of March, 1893.

Present: Hon. P. B. McLennan, justice presiding.

ANSON E. YORK and Ano.
vs.
WILLIAM W. CONDE and Ano.

The defendants having moved for a new trial at this term of court on the judge's minutes and to set aside the verdict for $2,921.25 on the grounds that the same is for excessive damages and is contrary to the law and to the evidence in the case and also upon the exceptions taken during the trial and after hearing E. R. Brown, counsel for said defendants in favor of said motion, and Henry Purcell, counsel for plaintiffs in opposition thereto, it was ordered that said motion be and the same is hereby denied.

Further ordered that execution on judgment herein be stayed for thirty days after entry thereof, and that the defendants have sixty days in which to prepare the case and exceptions herein.

P. B. M., *J. S. C.*

Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STAR-WEATHER
against
WILLIAM W. CONDE and JOHN C. STREETER.

Judgment, March 22d, 1893, 9.30 a. m.

18 The issues in this action having been brought on for trial before Mr. Justice McLennan, and a jury, at a circuit court held in the city of Watertown, N. Y., in and for the county of Jefferson, commencing on the sixth day of March, 1893, and the said issues having been duly tried, and the jury having, on the tenth day of March, 1893, returned a verdict for the plaintiffs and against the defendants for the sum of two thousand nine hundred and twenty-one dollars and twenty-five cents, and the plaintiffs' costs and disbursements having been taxed by the clerk of the court at the sum of four hundred and forty-nine dollars and thirty-nine cents, it is now, on motion of Henry Purcell, attorney for the said plaintiffs, ordered and adjudged that the said plaintiffs, Anson E. York and Wallace W. Starkweather, recover of said defendants, William W. Conde and John C. Streeter, two thousand nine hundred and twenty-one dollars and twenty-five cents, found by the jury as aforesaid, together with four hundred and forty-nine dollars and thirty-nine cents costs and disbursements as adjusted and taxed, amounting in all to the sum of three thousand three hundred and seventy dollars and sixty-four cents, and that the plaintiffs have execution therefor.

F. D. PIERCE, *Clerk.*

In Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STARKWEATHER
vs.
WILLIAM W. CONDE and JOHN C. STREETER. } Case and Exceptions.

This case was brought on for trial at the March circuit held in Watertown, N. Y., before Hon. Peter B. McLennan, and a jury.

ANSON E. YORK, sworn for plaintiff, examined by Mr. Purcell:

I reside in this city; am one of the plaintiffs in this action; my partner is W. W. Starkweather, and we constitute the firm
19 of York & Starkweather; our relations as copartners terminated January 1, 1892; we had been copartners prior to that time for ten or twelve years; I know James Gaffney and James Witherby; in the fall of 1889, they had a contract with the U. S. Government for the construction of officers' quarters at Sacket's Harbor; we commenced business with them September 27, 1889.

Mr. BROWN: I desire to make a suggestion here in view of the fact that the witness' evidence lies before the court, so that we know just what the examination is tending to. No dispute is made as to the existence of the evidence alleged in the assignment. A detailed account of the relations between York & Starkweather and Witherby & Gaffney,—especially that part of it tending to show that there was indebtedness beyond the amount of the consideration of this assignment,—is distinctly calculated to divert the attention of the jury from the issue in the case, and I therefore desire to raise the point now.

The COURT: The counsel may either take the concession, or he may go on and give the entire transaction with these parties. We will try to eliminate anything that is not pertinent to the issues.

Mr. BROWN: I desire for the purpose of putting myself fairly on the question, to suggest that we stand ready to admit that Witherby & Gaffney executed and delivered the assignment in question on March 27, 1890, to York & Starkweather, and that the indebtedness of Witherby & Gaffney is correctly stated therein; that a draft to the amount of forty-four hundred dollars to which said assignment related, was delivered by the Government to Mr. Gaffney on May 15, 1890, and by him delivered to the defendants on that day; that while such draft was in their hands, the plaintiffs demanded twenty-five hundred dollars thereof, and fully notified the defendants of the terms of such assignment, and the defendants refused to pay the same, or any part thereof to the plaintiffs. I make this because there is no question on that evidence, and we have been troubled somewhat on prior trials by facts creeping in that were foreign to the issue.

Mr. PURCELL: I accept the offer so far as stated.

The COURT: Is there anything else wanted?

20 Mr. PURCELL: Yes.

The COURT: I suppose it is conceded that York & Stark-

weather were at the times in question copartners; and that Witherby & Gaffney were copartners at the times in question?

Mr. BROWN: Yes.

The COURT: And this contract with the Government existed between the Government and Witherby & Gaffney?

Mr. BROWN: Yes.

The COURT: Were Conde and Streeter partners?

Mr. BROWN: No.

Mr. PURCELL: Will you admit the fact that the indebtedness to York & Starkweather from Witherby & Gaffney was for lumber and materials furnished by them to Witherby & Gaffney, which were used by Witherby & Gaffney in the construction of the officers' quarters at Sacket's Harbor?

Mr. BROWN: We do, pursuant to the contract mentioned in your assignment.

The COURT: And they were used pursuant to the contract between the Government and Witherby & Gaffney?

Mr. BROWN: Yes.

The COURT: That would seem to cover it, Mr. Purcell.

Witness continues:

The paper marked Exhibit 1 is the assignment in question; after the assignment was executed I received from Witherby & Gaffney five hundred dollars to apply thereon, which was to apply on notes, endorsed on notes that were lying at the bank past due; the assignment was given to cover a note signed by Witherby & Gaffney, dated March 3, 1890, for three thousand dollars, payable thirty days after date; the note was given by them on account of lumber
21 and materials furnished prior to the time of taking the assignment, and the five hundred dollars we received was endorsed on this note.

(Note marked Exhibit 2.)

Exhibits 1 and 2 offered in evidence and received.

"EXHIBIT 1."

See complaint.

"EXHIBIT 2."

$3,000.00. WATERTOWN, N. Y., *March* 3, 1890.

Thirty days after date, we promise to pay to the order of York & Starkweather three thousand dollars, at National Bank and Loan Co. Value received with interest.

WITHERBY & GAFFNEY.

On the same day that we took the assignment, we executed the paper (marked Exhibit 3) to Witherby & Gaffney, read in evidence, and is as follows:

"WATERTOWN, N. Y., *March* 27, 1890.

Having this day received from Messrs. Gaffney & Witherby a written order on Lieutenant J. E. Maclin for the payment of three thousand dollars, from balance due or to become due on contract

with the Government of the United States for buildings at Madison barracks, do hereby promise them that when the said money is so received, it shall be applied as payment on a certain promissory note we now hold against the said Gaffney & Witherby for three thousand dollars.

YORK & STARKWEATHER."

The note mentioned in Exhibit 3 is the note marked Exhibit 2.

Mr. PURCELL: I think your admission covered fully our serving a notice upon you.

Mr. BROWN: It did.

It is conceded that prior to the time the draft was turned over by Witherby & Gaffney to the defendants, Mr. York notified the defendants at Sacket's Harbor, on the same day, that he held a
22 written assignment of the fund to the extent of twenty-five hundred dollars or three thousand dollars, upon which five hundred dollars had been paid.

Witness continues:

On the morning of the day following, the one on which the defendants and myself were at Sacket's Harbor, I saw the defendants in this city; had a conversation with them relative to this assignment in Mr. Conde's store; they requested me to lend them the assignment; I demanded the money of them in that conversation, but they didn't pay it or any part of it; they said they wanted to show the assignment to counsel; I don't know that they were both together at that time; they were both there that morning; I saw them both there, but I think Mr. Conde was the one that made the request; I saw Mr. Conde later in the day when he returned the assignment to me; I understood from what he said that he had consulted counsel with reference to it, and when he returned it, he refused to pay; in the talk at Sacket's Harbor when I demanded the money and notified the defendants of our assignment, they said that Mr. Gaffney was owing them as endorsers, and the substance of their talk was that they were looking for that identical draft that we were looking for to reimburse them for their endorsements.

Q. Was there anything said in any of these conversations with Conde and Streeter about their having an assignment of this fund?

Objected to by defendants as incompetent and immaterial. Overruled. Exception.

A. There was not.

Plaintiff rests.

Mr. BROWN: Each of the defendants move separately in his own behalf for a nonsuit on the ground that the plaintiff *has* failed to make out a cause of action against him; on the ground that the original transfer or assignment of this claim against the United States Government was void upon its face, under section 3477, and other related sections of the Revised Statutes of the United States.

Also that the plaintiffs have not the capacity to sue under section 1910 of the Code of Civil Procedure.

23 Motion denied, exception to each defendant.

WILLIAM W. CONDE sworn for defendants, examined by Mr. Brown

I am one of the defendants in this case; I am a hardware merchant in this city; and have been for nearly fifteen years; I was a surety to the United States Government for Witherby & Gaffney, on a contract for the construction of quarters at Sacket's Harbor; I think the contract was about eighteen thousand dollars, approximately that; the endorsements that I made for Witherby & Gaffney as they existed prior to March 27th are as follows: There was one note dated February 21, 1890, and due May 4, 1890, of seven hundred dollars; the bank has it $708 51 as due May 4th; then there was one, dated February 14, 1890, due May 5th, for two thousand dollars; there was one dated December 16, 1889, due February 19, 1890; the bank has it $707.35; there was one dated January 23, and due March 26th; that as I remember it was a one-thousand-dollar note, and there was a partial payment of five hundred dollars on it, made March 21, 1890; there was one dated March 17, 1890, due May 20th for three hundred dollars; that is all that is here except two; these notes amounted to forty-two hundred dollars; that was the state of the account on the 27th day of March; these notes were all endorsed by myself and Streeter for the accommodation of Witherby & Gaffney; no other consideration whatever; on April 16, 1890, we endorsed a note due May 13, for five hundred dollars, and on April 28, another due May 31, for two hundred dollars; on the occasion of endorsing the five-hundred-dollar note in April, I wrote out the memorandum, Exhibit 4, and Witherby & Gaffney signed it at that time.

Received and read in evidence.

"EXHIBIT 4."

"WATERTOWN, *Apr.* 18, 1890.

"Consideration, Jno. C. Streeter and Wm. W. Conde endorsing note for $500 this day, we agree upon receipt of check which we receive from Lieut. Macklin, for the amount due us, about $4,500, we agree to pay sufficient on notes in Jeff. Co. bank to reduce

24 them to seventeen hundred dollars, and to pay Jno. C. Streeter, individually, $350, and to pay Wm. W. Conde, individually, $250, to apply on their separate accounts.

"WITHERBY & GAFFNEY."

And two days later Mr. Gaffney signed the name of Witherby & Gaffney to the next memorandum here, marked Exhibit 5.

Read in evidence.

"EXHIBIT 5."

"WATERTOWN, *Apr.* 18, 1890.

"That there may be no misunderstanding about the intention of the foregoing agreement, we hereby assign for value received to John C. Streeter and Wm. W. Conde sufficient of the moneys coming to us from Lieut. Macklin, R. Q. M., to pay the claims as specified in the aforegoing agreement.

"WITHERBY & GAFFNEY."

The five-hundred-dollar note and the two-thousand-dollar note had not been renewed; they were new notes; we began endorsing for Witherby & Gaffney along about September, 1889; I think the first endorsement was a one-thousand-dollar note; these notes that I have stated were the continuation of the endorsements which we had begun back in September, 1889; they were either renewals or discounts of new sums; I can't distinguish which; prior to March 27, 1890, at the time of the endorsement of some of these notes, I had a conversation with Mr. Gaffney in regard to securing me for my endorsements; I had a small account against Witherby & Gaffney for hardware and merchandise sold them that went into the barracks on the 27th of March amounting to $264.58, and at the completion of the work, they were owing me $470.58, on which there is a credit of $24.26, leaving the amount of the personal account $446.32; the conversation that I had with Mr. Gaffney in relation to securing me for my endorsements occurred, I think, as far back as in December, 1889; don't think I can give the exact words; I had so many conversations in regard to securing; at that time I told him that we were on considerable paper there, and I began to feel a little nervous about it, and I asked him what he could do to fix it so that we would feel secure about it, and he said he would do anything that we wanted him to do; he says, "I will give you an order on Maclin, or I will assign the contract to you," and wanted me to make some suggestion.

(It was here conceded that Lieutenant Maclin was quartermaster and disbursing agent of the United States Government at Sacket's Harbor.)

He said that he would give us an order on Lieutenant Maclin, or if we wished, he would assign the contract right over to Streeter and myself; I replied that we didn't want the contract: we wanted to be in some shape where we would be sure of our pay, and I think there was very little else said; then I think I let the matter drop there to have a talk with Maclin, and I did have a talk with Lieutenant Maclin after that.

Mr. PURCELL: I object to what Lieutenant Maclin said as incompetent and immaterial and hearsay.

The COURT: I don't see how it is competent.

Mr. BROWN: We want to prove it. We will offer to show that Lieutenant Maclin informed the witness that an order given by

Witherby & Gaffney for the payment coming to Witherby & Gaffney would be without value. He would not recognize it.

The COURT: I don't see how that would bind the plaintiffs or affect them in any way.

Objection sustained. Exception.

I had a talk with Maclin; I had another talk with Gaffney, but can't say positively when it occurred; it occurred at the time of endorsing or renewing notes, and I think it was either in December or January; I told Gaffney Lieutenant Maclin would not accept this order if he gave it to me, inasmuch as we didn't want the contract, and then he told me that all our notes should be paid out of that last money, the final estimate, the percentages that the Government was keeping back for faithful performance of the contract; and I asked him if we could feel sure that we were going to get it out of that money; he says, "You can, that money will be kept purposely for that;" and he says, "If necessary, I will turn
26 over the check or draft for the money for you to take up these papers;" the account owing me was talked over right in with the rest; can't say that it was mentioned every time, because the notes were more important in my mind than the account was; I can't say just the time when I had a conversasion with Gaffney in which the account was mentioned; but he told me that that account should be paid from the last money, and I made an agreement with him that the account should run until the final payment; I was not to ask him for any pay on it before that; at subsequent times after this conversation that I have related, when we were making these endorsements, the question would come up; says I, "Can we rely upon these promises that you have been making to us?" and he assured us that we could; that that money would be kept for that purpose; I think those talks came up at every renewal, at every endorsement, that we asked reassurance from him; on the 15th of May we got a check or draft from Mr. Gaffney and took it to the Jefferson County bank, and with the proceeds paid up thirty two hundred dollars of our endorsed notes, and paid Mr. Streeter, check, $350.00, and I took $250.00 to apply on my account in the store; the amount they finally took was about forty-four hundred dollars; I reduced the face value of the endorsements thirty-two hundred dollars; according to the bank's statement we paid up on these notes $3,235,50; it is a statement from the cashier of the bank; I believe that to be right; I paid Mr. Streeter $350 for endorsements, and my own personal account was $250, and the balance, amounting to $628, I turned over to Mr. Gaffney; at the time Mr. Gaffney gave me the check or draft he said I must pay him back the balance above what we kept; that he wanted to pay labor with; I agreed to do it at the time he handed the draft over to me; this money that was got on these endorsements Gaffney & Witherby told me that they were using it in their contract at Sacket's Harbor, and the material I sold them from the store they used for the same purpose.

Cross-examination:

I have had business relations with Mr. Gaffney prior to this one. He built a sewer up on Rutland street; my impression is that it involved some eight or nine thousand dollars; it was a contract that he took from the city, and I was surety for him on that
27 contract; I sold him the sewer pipe that went into the construction of that sewer; Gaffney paid me for all I sold him; I don't remember that I then took assignment from him against any one to secure me; he had a contract at Utica for the building of a sewer subsequent to the Rutland Street sewer; I was surety for him on that; I took no security from him against liability on that bond; I sold him some material for the construction of the Utica sewer; not a large amount, as it was a brick sewer; I had confidence in him sufficient to become his surety on these contracts; the bond to city of Watertown was some $8,000, and one to Utica smaller; I was surety for him on the Sacket's Harbor contract; the bond I think was thirty-seven hundred dollars, and the contract was for eighteen thousand dollars; that is my impression; I can't give the exact figures; my liability was limited to thirty-seven hundred dollars; I had frequent conversations with Mr. Gaffney as to how he was getting along with his contract at Sacket's, and also as to how he was keeping up his payment for materials there, and he on each occasion assured me that he had the material nearly all paid for; he also assured me that he had the labor paid for as work progressed; I am not able to give any date on which he told me that the material was not nearly paid for; he never told me that it was not nearly paid for until I had found out from other sources prior to the 27th of March; I knew he was getting lumber and material for the construction of officers' quarters from the plaintiffs, I think I learned it as early as the fall previous; I asked him if he was paying for the material that he got of plaintiffs, and he told me that he was keeping his material practically largely paid for, or words to that in substance; I understood prior to March 27th that he was owing very largely; I received the information from Mr. York himself; he came into my store, and told me all about it; it was some time in the winter before the 27th of March; I can't tell positively whether this talk with York was after or before I had the talk with Gaffney about taking security; it was three years ago.

Q. Did you ever take an oral assignment of a claim before this one?

A. No.

28 Q. Did you know at the time that you could take an assignment orally of such a claim as this?

A. No, sir: some of the notes which I have mentioned here are renewals; at the renewal of the first note I don't think there was anything said about Gaffney's paying these notes out of moneys from the last estimate by the Government, the percentages that were kept back from him; he simply wanted to carry it along, that his estimate at that time was not sufficient to take it up; I won't say that we talked about security at the next conversation; the conver-

sations generally occurred in my store; the one that we were quarreling about occurred in my store; I don't think there was any one present except Gaffney and I; I won't say whether Mr. Streeter was present at that time or not; there were some talks that I had individually, and some when Mr. Streeter was present; I told him at that time that I wanted security, and he replied that he would do anything I wanted him to do—assign the contract to me, or he would give me an order on Lieutenant Maclin; I said I didn't want the contract and subsequently investigated about this order on Lieutenant Macklin, and found it would not do; I saw Macklin and asked him about it; the lieutenant said he could not accept an order; I don't remember anything else that was said by Gaffney on this occasion; at that time I didn't understand that he owed any very large bills; he was owing us considerable; I continued to sell him hardware and material which is not all paid for yet; he still owes me $196.27; I sold him all told $470.58, less $24.26 merchandise returned, worth of material that went into the buildings at Sacket's Harbor; and this was all paid for but $196.27; when he asked me to endorse in January or February, I questioned him about the contract, and how he was getting on; he told — he was keeping the materials largely paid for, in fact nearly all; I had no reason to doubt him at that time; he told me that the large amount the Government was keeping back, which would come in on the final settlement would be sufficient to take care of the notes, and they would all be paid; he told me that the amount was twenty per cent.; I think the first time he promised to turn over the check to me was after the talk I had with Lieutenant Maclin; I can't say that I ever told about the talk with Lieutenant Maclin until today; don't know that
29 the question was ever asked me; my best recollection is that it was after I had seen Lieutenant Maclin that he said he would turn over the check to me when it finally came; after refreshing my memory by reading the printed case last trial, I think that the conversation in which Gaffney offered to assign the contract to me, or to do anything I wanted, and that he also said that he would turn the check over to me was in my store in December or January; after that I saw Lieut. Maclin in the city, and had a talk with him about the order in which he said that he could not take it or accept it; I never learned from Gaffney that he had made any kind of a writing to these plaintiffs; I learned on one occasion that the plaintiffs had a paper from Gaffney, but didn't understand the nature of the paper, simply it was told to me that they had an order; that was the way it was told to me; from Witherby and Gaffney against this fund; I should think I learned that between March 27th and April 16th; I can't say what the date was, after April 1st, I think it was before I made this writing on April 16th; I spoke to Gaffney about it the first time I saw him afterwards; on April 16th, he wanted me to endorse a five-hundred-dollar note, and at that time I made a writing; the one that has been read in evidence by Mr. Brown; the writing was that in consideration of myself and Mr. Streeter endorsing a five-hundred-dollar note, that he agreed upon receipt of the check from Maclin, he would pay the notes in the

Jefferson County bank; in this action we are trying here, I claim this money was due Streeter and I by virtue of an agreement, so that when I wrote on April 16th, the amount due us, "Witherby & Gaffney," I did not write it correctly; it was a casual memorandum; that is not exactly what Gaffney promised to do in the talk in December or January, that on receipt of the check he would pay the notes; I wrote the words in the memorandum "the amount due us from the Government, Witherby & Gaffney;" I now claim it was due to Streeter and me; two days afterwards on April 18th, I took another writing from him; the one of the 16th I wrote, and the one of the 18th I wrote, but think my lawyer dictated it; I took an assignment in writing from Witherby & Gaffney, and had his promise which I claim to be an assignment away back about March 27th.

Q. You took another writing or some other security from Witherby & Gaffney, did you not?

30 A. Yes.

Mr. BROWN: I object to that and move to strike it out that he took another security.

Mr. PURCELL: I don't offer it for the purpose of showing anything except that they were relying upon writing instead of oral agreement. The offer is to show that on March 26th they took mortgage on real estate to secure them against liability on these particular notes.

The COURT: Not for the purpose of showing that it is a valid security, or anything of that kind. That is a security that they can enforce, but for the purpose of showing that they did not rely upon the verbal agreement.

Mr. PURCELL: Yes; that they took a written security one day before our written assignment, it being a mortgage on real estate owned by Mrs. Gaffney, the wife of Mr. Gaffney. That is the only purpose of it.

Mr. BROWN: That question has been before the general term.

Mr. PURCELL: But I don't think the decision of the general term held that we could not prove that fact.

The COURT: The only question is whether it may not be proper evidence. How important it is is another question. Simply as affecting the question whether or not the defendant understood that he had a valid assignment of the claim prior to March 27th, or of this check, the amount that was to become due on this contract prior to March 27, 1890; whether it was not competent evidence as bearing upon that question. Clearly under the decision of the general term, it could not affect his rights under this assignment.

Mr. PURCELL: That is all the purpose of the evidence.

The COURT: I think upon that theory alone, for that purpose solely, that I will admit the testimony, and give you an exception.

31 Mr. BROWN: I object to it as incompetent, immaterial and irrelevant, and except.

Witness continues:

I took a mortgage on March 26, 1890, from Mrs. Gaffney, the wife of James Gaffney himself, to secure myself and Streeter against our liability as endorsers for Witherby & Gaffney.

Same objection and exception.

The mortgage was prepared in Brown & Adams' office, and put on record; this mortgage, of course, was in writing, and was recorded the same day it was given; on May 15th, I did not say to York at Sacket's Harbor that I had an assignment of that fund, and I didn't tell him the following morning that I had any such thing; when he let me take his written assignment for my counsel to examine I made no mention of any assignment to me, nor did I mention it when I returned his assignment to him; Mr. Streeter went with me to the bank to take up the note, and my impression is that Gaffney did not go; Gaffney was not there to receive the balance of the money; it was not paid to him just then; we retired $3,233 of the notes; I gave the balance of the money to Gaffney in my store.

Redirect:

I should say that the credit of Witherby & Gaffney in January and February, 1890, was limited; I stated this morning that at first my impression was that there was a lapse of time between the conversation with Gaffney about his assigning the contract to me, and the conversation about turning over the check or draft, and my attention was called to the testimony on the previous trial that it was at the same time, and on casually looking that over, I came to the conclusion that I had testified before, that it was the same time, and I wish now to change it and testify that it was as my first impression was, that there was a lapse of time there.

Recross-examination:

There is nothing said that there was a lapse of time between these two conversations in the appeal book; I say now as I first
32 said this morning, that my impression is that there was a lapse of time in there; I stated on the other trial that I had a talk with Gaffney, when he offered to assign or transfer the contract to me, which was about January or February, 1890; I think it was in my store; we had talks sometimes in my store and sometimes in Mr. Streeter's office; he asked me for more money, and for further endorsements; I questioned him on his contract, how he was coming out, and he said to me that he was keeping his material largely paid for,—in fact, nearly all,—but still wanted more money; he told me the same as before that the large amount the Government was keeping back which would come to him on the final settlement, all the notes would be paid at that time; I state now that the time he first talked to me about assigning the contract over, assigning the contract, or giving me an order on Maclin, that there was a lapse of time in my impression before the first offer to turn the check or draft over to him; I also stated on the other trial that in

the same conversation, he said if it was necessary he would assign the contract to me, and I told him I didn't want the contract; all that I wanted was to be assured of my pay for what I had furnished them and endorsed for them.

JOHN C. STREETER, defendant, sworn:

I am a resident of this city, and have been all my life; was formerly a merchant here and postmaster; I remember making endorsements for Witherby & Gaffney in the fall and winter of 1889 and 1890; the total amount of our endorsements on the 27th of March was forty-two hundred dollars; those were the endorsements of Streeter & Conde; I had an endorsement outside of that for $350.00, and I was making the endorsements in January, December and February; I saw Mr. Gaffney on the occasion of making endorsements in December and had a conversation with him in Mr. Conde's store, when Mr. Conde was present about securing us for these endorsements; I says to him, "I am not exactly satisfied with the way this is moving, and it seems as though we should have some security, in some shape or indemnity," and he claimed that there was so much being held back, twenty per cent., which rendered him unable to meet his demands for labor &c., from the estimates that they were giving him; he said that he would secure us in any way he could, and he would assign the contract to us;
33 we had got to carry him along until the work was finished, and the final estimate when he received it from the Government, it should be turned over to us to liquidate and wipe out whatever responsibility or liability we had incurred for him; that was about the sum and substance of it; I had several talks with him at my office when Mr. Conde was not present in January and February; the one that is most clear in my mind was in February when he asked for a two-thousand-dollar note, February 14th; he said that we should have the draft when it came in the final settlement, to liquidate all this paper; and, in addition, that this was a sacred debt, and nothing should step in the way of its being carried out; he said that our separate endorsements should come in just the same; afterwards on April 16 and 28th. I signed the endorsement of the five-hundred-dollars and two-hundred-dollar notes; Mr. Conde had the memorandum that Witherby and Gaffney signed at that time; these endorsements were accommodation endorsements; we had no benefit or advantage for making them, and had no dealings with Mr. Gaffney except as accommodation; I know that Witherby & Gaffney had pretty light credit that winter.

Cross-examination:

I think I had known Mr. Gaffney six or eight years prior to these endorsements; I have had business dealings with him; rented him a store, and think I was surety for him on a sewer contract with Mr. Conde; I once sold him a stock of goods for which I took notes and carried them along for him, small amounts; when I became surety for the sewer contract, I did not take any security from him

against my liabilities; I think I have stated all the business transactions I had with Gaffney prior to the Sacket's Harbor deal; he didn't pay all the paper that I endorsed for him; I think I had two notes which had not been paid for the stock of goods I sold him; the first endorsement that I made for him growing out of the Government contract was in September; that was a piece of paper for seven hundred dollars; he agreed that after they got their first estimate, which would be a month hence, they would retire this paper; he didn't do it; I continued to endorse for him along until December and January; the conversation I had with him in December in relation to security was in my office; I said that as these things
34 were maturing and not being paid, that we didn't know what magnitude they would reach, and it was time we were put in shape in some way in this matter with security; and he said to me that he would do anything that was required of him that he could do—turn over the contract, or secure us in any way; from my office we went up to Mr. Conde's office, and the conversation was repeated; I went with Mr. Gaffney up to Mr. Conde's office, or met him there, and we had further talk; I think it was after I had endorsed for him individually; I have no memorandum showing when I endorsed for him individually; my entire individual endorsement is $350.00; it is an endorsement outside of this business; on every occasion he told me he would turn over this check, and I said he must protect the $350 note which had not then matured, which he agreed to do; he said he would pay my liability out of the fund; I can't tell you exactly when he first said that he would pay the notes in the Jefferson County bank out of the fund which was coming to him out of the Government, but it was some time when we were called upon to make an endorsement in January, about the 1st, and the language was that he would use this check to pay those notes; pay what we were liable for upon those notes; he also said that he couldn't move without us; that we had furnished him his money, and he had got to do as we said in the matter as regards security, and if we would continue to help him, he would take this particular fund, and retire those notes; I think this conversation was February 14th, when we endorsed the two-thousand-dollar note; don't recollect saying anything to Mr. York about this transaction when I talked with him at Sacket's Harbor; think I went with Mr. Conde to take counsel on the question of the first assignment of the fund; I think I saw Mr. York after that, and told him that our claim we thought was ahead of his; that we were better entitled to our money than he; I can't say when I told him that, but I think that is the conversation that I made after I visited counsel; I learned very soon after March 27th, that York & Starkweather had an order on Lieutenant Maclin for part of this fund; I knew they were furnishing some materials to Witherby & Gaffney; I learned it prior to the time that we went down there to Sacket's Harbor; I knew of the paper that Mr. Conde drew on April 16th; read it myself; I think I knew it before I endorsed the note for
35 five hundred dollars on April 16th; I knew of the preparation of the paper April 18th relating to the assignment of

this same fund to myself and Mr. Streeter; think it was done by Mr. Conde principally; I suggested we had better get it; we took the two papers of April 16th and 18th, one was an agreement to pay, and the other an assignment; I knew about the taking of the real-estate mortgage.

Redirect:

I stated to Mr. York my reason for not paying over the money to him; I said to him that I thought we had a prior claim and had a better right to this money; it was absolutely ours; this was on the 16th of May; it was the day that we got the draft that I told this to Mr. York.

Testimony of James E. Maclin read in evidence by Mr. Brown.

JAMES E. MACLIN being duly sworn on behalf of defendant-, testifies:

I am regimental quartermaster of the 11th regiment located at Sacket's Harbor; as such I had charge of the work that Witherby & Gaffney were contractors for; I was the disbursing officer through whom they received their pay.

Q. At what date, by the terms of the contract, was their contract to be finished?

A. They were entitled to the money as soon as the buildings were turned over; they turned them over, I think, on the 12th of May; I deducted the penalty at the rate of ten dollars per day for eleven days for not fulfilling the contract; that has never been paid to Witherby & Gaffney; it has been sent to the Treasurer; I accepted the work on the 12th of May.

Defendants rest.

A. E. YORK, plaintiff, recalled, examined by Mr. Purcell:

I heard Mr. Streeter testify in relation to having a conversation with me about their claim to this money, which was after
36 the time that we loaned them our written assignment; he did not say that his claim was prior to us, and that they were absolutely entitled to the money; the first talk that I ever had with him upon the subject was at Sacket's Harbor; we talked about it the next morning in Mr. Conde's store.

Cross-examination:

I don't think that they ever claimed that they were entitled to the money as against us; they refused to give us the money; I had several talks with them on the 15th of May; I saw them on the 16th at Mr. Conde's store; I don't think I had but two conversations with them on the 16th; I had a conversation with them before banking hours on the morning of the 16th; that was the conversation in which I gave them our assignment; I came back and got the assignment later; think about an hour afterwards.

Redirect:

They didn't state to me at any time by what claim or title they claimed this money; simply refused to give it to me.

WILLIAM W. CONDE, recalled by defendants, testified:

Our security by mortgage and what we got from the draft were not sufficient to pay our liabilities incurred by Mr. Gaffney.

The COURT: I have not allowed that evidence with any such view. They have not shown even what the mortgage was; simply that they were getting other security.

Mr. PURCELL: I do not object to their showing what his security was.

The COURT: Very well then, let him answer the question.

Mr. BROWN: Under your honor's statement I won't undertake to prove it; I prefer to leave it as — is, as I objected to the introduction of the original evidence.

37 Mr. PURCELL: You leave in what you put in?

Mr. BROWN: No, I will withdraw that; withdraw it entirely.

Mr. PURCELL: All right.

GENTLEMEN OF THE JURY:

The facts in this case, which it is necessary that you should consider, are in a very small compass; and although the litigation is an important one to both of these parties, the issue which you are to determine is one that you should readily comprehend, and be able to enter upon the discharge of your duty in this case with a clear conception of what that duty is.

It would appear that some time in the summer of 1889, Witherby & Gaffney, a firm of contractors residing in this city, entered into a contract with the Government of the United States to erect certain buildings at Sacket's Harbor. They were to do the work and furnish the materials necessary for the completion or carrying out of that contract. They were to receive in pay, for such work done and materials furnished, about the sum of $18,000. And it would appear, I think it is conceded, that by the terms of the contract entered into between Witherby & Gaffney and the United States Government, the United States Government was to retain 20 per cent. of the contract price until the contract was completed. That was for the security and protection of the Government. Therefore this 20 per cent. was not due, and could not be received by the contractors or any assignees of theirs, until the completion of the contract.

It appears that in the course of the construction of this building at Sacket's Harbor, Witherby & Gaffney applied to the plaintiffs in this case, York & Starkweather, for material with which to construct the buildings. They were copartners, doing business in the city of Watertown, and engaged in furnishing lumber. After they had

furnished some amount of lumber, the particular amount I
38 do not remember, and it is not very material, the plaintiffs desired to be secured for that which they had furnished—it then amounted I think to something like $3,000—and such conversation was had, or such agreement was made, by which the contractors, Witherby & Gaffney were willing to, and as a matter of fact did assign to the plaintiffs in this case, by an instrument in writing, dated the 27th of March, 1890, and which has been read to you, the sum of three thousand dollars which should become due upon the completion or in the course of the construction of this work at Sacket's Harbor. The assignment has been read, and the important part is the last, which is as follows:

"Now, therefore, of the monies due and to become due us from the said Government, we do hereby, for value received, assign and transfer to said York & Starkweather"—who are the plaintiffs here—"the sum of $3,000, and do hereby authorize, empower and request and direct Lieutenant J. E. Maclin, through whom payments are made for such construction, to pay said York & Starkweather on our account for such construction, the full sum of $3,000."

There was $500 paid upon that assignment, leaving a balance due to the plaintiffs under this assignment, providing the assignment is valid, in their favor of the sum of $2,500. That assignment, as I said, was executed on the 27th day of March, 1890, and delivered to the plaintiffs in this case; and if that was all there was of the transaction, so far as the law has up to this time been settled, the plaintiffs in this case would be entitled to recover the sum of $2,500 under this assignment made the 27th day of March, 1890, against the defendants in this case. But it also appaars that the defendants, one or both, I think both Mr. Conde and Mr. Streeter, when Witherby & Gaffney entered into the contract with the Government, became sureties upon their bond——

Mr. BROWN: One became surety.

The COURT: Mr. Conde became surety upon the bond of Witherby & Gaffney required to be executed by the Government; and that soon after the contractors commenced work upon this building at Sacket's Harbor, they commenced to get accommodations from the defendants in this case by their endorsement upon notes
39 of the contractors upon which they could raise money—and as is conceded here I think—they obtained this money for the purpose of enabling them to proceed and carry on the work upon this contract.

Now, it is claimed that some time after this endorsing of notes by the defendants in this case had commenced, the plaintiffs made some inquiries of the contractors as to their security, how they should be paid, and that finally, as a result of that conversation, some time prior to March 27th, 1890, the particular date is not disclosed, they made an agreement with these contractors, by which Mr. Gaffney, acting for himself and his partner, agreed that the final check that came to them upon the completion of their contract with the Government, should be turned over and delivered to the defend-

ants in this case. In other words, that by this verbal agreement, the last payment which was to be made, which included the 20 % that was being held back by the Government, and whatever else remained unpaid at the completion of the contract, by that agreement belonged to the defendants in this case; and that the contractors agreed to turn it over to them as soon as it was received by them from the Government officials.

And so the question for you to consider is whether this verbal agreement, or oral agreement as it is called, was made; whether there was such an agreement made prior to the 27th of March, 1890.

The other agreements or assignments that were made in writing on the 16th and 18th of April respectively, would not, as against the plaintiffs in this case, entitle the defendants to retain this money. So that they rely in this case, so far as the question is presented to you, upon the alleged oral or verbal agreement which they say was made prior to the 27th day of March, 1890.

So then that presents the square issue to you, whether this written assignment produced by the plaintiffs, Messrs. York & Starkweather, which was executed on the 27th day of March, 1890, is to prevail in this case; or whether the equitable assignment alleged in this case, and testified to by the two defendants, Mr. Conde and Mr. Streeter, alleged to have been made prior to this time, and I think some time in December or January previous, whether that shall prevail, and operate to transfer or make them, the defendants, entitled to receive and hold and retain this fund.

Now, gentlemen, in the consideration of that question, you have a right; as has been suggested by the able counsel representing the several parties here, to consider not only the sworn testimony in this case; but you have a right to consider all the circumstances surrounding the transaction. You have a right to ask yourselves whether it is probable, whether it is reasonable that if this alleged agreement was made in December or January, that it would have been reduced to writing; whether it is reasonable that they should have allowed it to remain simply as a verbal arrangement all that time. You have a right to consider whether or not, if they had this verbal understanding, which as both parties understood transferred legally this fund to the defendants, whether they then would have obtained the agreements or assignments of April 16th and 18th after that time. You have a right to take into consideration what the defendants said as to their knowledge bearing upon a legal assignment, to ascertain whether or not the parties, the minds of the parties met; whether there was a mutual agreement; whether the defendants understood at that time that they were to have the check,—from what was said, I do not mean what they supposed,—but from the conversation that there took place, whether the defendants understood that they were to have this check, the check to pay for the final estimate from the Government, when it should be received.

Now I do not know how I can aid you any further. That is the simple, distinct issue in this case, and you are the ones who must settle it, must ascertain whether or not there was an agreement

made between Witherby & Gaffney and the defendants in this case, prior to March 27th, 1890, by which the contractors agreed that this check which should be received upon the final completion of this contract, should be turned over by them to the defendants in this case. If that agreement was made prior to March 27th, 1890, that is an agreement that the check should be turned over, prior to March 27, 1890, then their assignment, their equitable assignment, makes their title to this fund superior to the title which the
41 plaintiffs would otherwise acquire under their written assignment, dated March 27, 1890.

But, gentlemen, if no verbal assignment, no verbal agreement, was made, then the plaintiffs are entitled to a verdict at your hands for the sum of $2,500 with interest. The amount of interest they will agree about.

You have a right, as I said before, to consider all the circumstances. The counsel for the respective parties have ably presented their views to you; they have called your attention to what they believe to be the important circumstances which throw light upon this transaction, and it is un-ecessary for me to go over it again. I want to say one thing, however, and that is that with the result of your verdict you have nothing to do; that is none of your business, how your verdict affects the defendants, or how it affects the plaintiffs. You are only here for the purpose of expressing by your verdict, your honest convictions of where the truth in this matter is. How it affects the defendants, how it affects the plaintiffs, is none of your concern.

And I have often thought, as I have sometimes said, that the better way for a jury to do, is to regard the parties on the one side or the other, simply as John Doe and Richard Doe, and take the evidence, and all the facts and circumstances in the case, and make up their minds where the truth of the matter is.

You have a right to consider, if you believe that to be the fact, that these defendants did not, when their attention was first called to this matter by the plaintiffs, say to them, "We have a verbal assignment." You have a right to consider whether, at that time, from the evidence, if there is any evidence bearing upon that question, whether they knew about a verbal or oral assignment of a fund of this character, or of an equitable assignment. You have a right to take, as I said, all those things into consideration, simply as an aid to you in determining the main question, and the only question; and that is, was this alleged agreement, alleged to have been made on the part of the defendants, actually made, prior to the 27th day of March, 1890.

42 Your attention has been called by both counsel to the fact that Mr. Gaffney has not been called. You will give that such importance as you think it is entitled to; you may consider it for or against either of the parties. You may consider, in that connection, that Mr. Gaffney had his agreement, his transactions with the defendants, that they received the money from him at the time, and you are to find,—if you come to the consideration of that and deem it important,—and it is for you to say whether it is or not,—whether it would be reasonable for the plaintiffs to call him, or

whether it would be more reasonable for the defendants to call him; and if there is any importance to be attached to it one way or the other, who it should militate in favor of or against.

That is all I think I ought to say; all I can say; I think of nothing else that will aid you. I only desire to add that this action has troubled the courts and the juries of this county for some time, and we want it now to be decided in the best possible fashion; get at the truth of it; give it your best consideration. Take it as business men, look at these assignments, these various instruments, remember carefully what each witness has said, all of the circumstances in the case: and then, as intelligent business men, men of experience—not as lawyers,—that is not necessary, because this is a matter of practical common sense; but let your best judgment work at it for a little while, and I am sure you will reach a proper conclusion in the matter, and a conclusion that if the court has done its duty, these parties will, or must be satisfied with. Take the case, gentlemen of the jury, and consider it as best you can.

Judge PURCELL: I ask your honor to charge the jury that if Gaffney simply promised to pay the notes that Streeter & Conde had endorsed for him, out of this fund, that it did not amount to an equitable assignment.

The COURT: I so state. I supposed I did state that in substance.

Judge PURCELL: I ask your honor to charge that in order to constitute an equitable assignment of the fund in question by the language of Gaffney, that there must have been at the time that he expressed the language a present purpose to pass an interest
43 in the fund to be created, and one that was accepted by the defendants.

The COURT: What I have charged is, and what I repeat is, that the minds of the parties must have met, the same as in making any other contract. There must have been an intention that the check, when it was received, should be delivered by Gaffney to the defendants in the case.

Judge PURCELL: That there was a then present purpose to that effect.

The COURT: I so charge.

Judge PURCELL: Made by him, and concurred in by the defendants.

The COURT: I so charge; I think I did charge that.

Judge PURCELL: I did not quite understand. For the purpose of the record, I desire to except to so much of the charge as stated that in any event, upon the evidence in this case, there was an oral assignment of this check or fund from Witherby and Gaffney to the defendants.

The COURT: What was that?

Judge PURCELL: For the purposes of the record I ask your honor to charge that there is no evidence in the case whatever that constitutes an equitable assignment of the fund from Witherby & Gaffney to the defendants.

The COURT: Oh, yes; I refuse that.

Exception.

Mr. BROWN: I would like to have your honor charge the jury that the fact that the demand of York & Starkweather against Witherby & Gaffney was for materials furnished in the erection of officers' quarters at Sacket's Harbor adds nothing to their equity as against the defendants, the fact that their lumber went into the contract adds nothing to their equity.

44 The COURT: I do not think that affects this question, as a matter of law.

Judge PURCELL: I desire to except to that.

The COURT: I mean to say that the fact that the lumber which was obtained from York & Starkweather, the plaintiffs, went into the building, has no materiality, no bearing upon the issue to be determined by you. The simple issue is whether the alleged verbal assignment, equitable assignment, was really made, and if it was, whether it was made prior to this written assignment executed by Witherby & Gaffney.

Judge PURCELL: Give me an exception to that.

Mr. BROWN: I have had some doubt whether the jury would appreciate the term "equitable assignment," and I would like to have it elucidated to the jury. I have no doubt that the counsel and court concur upon the subject, that the words "assignment" are unnecessarry, and that simply an agreement to deliver the check in the future for a certain purpose, was an equitable assignment.

Judge PURCELL: That is your statement of it. The question has been, I think, charged by the court.

The COURT: I think I won't charge further than I have upon the subject. Whatever the definition of verbal assignment is in the abstract, I have endeavored to tell the jury what it amounted to in this case.

Mr. BROWN: I think perhaps I can put my request in form to raise the question; that is that an agreement to deliver the check or draft when it came from the Government to Conde and Streeter, without any other words of assignment, would operate to entitle Conde and Streeter to the same.

The COURT: That is substantially what I have charged.

Judge PURCELL: That standing as a bare proposition, I except to.

The COURT: Let us understand each other.

45 Mr. BROWN: I will read it again; that an agreement to deliver the check or draft when it came from the Government to Conde and Streeter, without any other words of assignment, would operate to entitle Conde and Streeter to the same.

The COURT: That would have to be modified a little; there would have to be an agreement, based upon a consideration, and an agreement in which the minds of the parties met, present at that time, present intention; and if the agreement was that for the purpose,—so far as applies to this case—that for the purpose of paying these notes, that when the check was received they would give it to the defendants in this case, that constitutes an equitable assignment, and would entitle the defendants to recover, if that is found to be true.

Mr. BROWN: And I would like to have your honor charge the

jury that, if such an agreement was made in consideration of the endorsements, that the understanding of Conde and Streeter as to whether the agreement could be enforced legally is unimportant.

The COURT: Only as bearing upon whether it was made or not.

Mr. BROWN: The request assumes that it was made. I say that if there was such an agreement, that then the understanding of the parties, Conde and Streeter, as to whether the agreement could be enforced legally, is unimportant.

The COURT: Assuming that the agreement was made, that is true. But there should be added to the proposition, that they may consider whether or not they would enter into an agreement that they knew to be valid, if they did so know it.

Mr. BROWN: They did not know anything about it, according to the evidence.

The COURT: If you state that in your proposition then I charge it without any qualification.

Mr. BROWN: All right, that is what I put in. And I would like also to ask your honor to charge the jury that such an agreement to deliver the check or draft would amount to an assign-
46 ment; although not in writing, a valid enforceable agreement, although not in writing.

The COURT: That is right.

Judge PURCELL: In that connection I ask your honor to charge the jury that in determining wheth- the agreement to assign the check was actually made they may take into consideration the fact that Conde knew nothing about an oral assignment, oral equitable assignment, at the time, as testified to by him.

The COURT: I think I have charged that; I will not charge further upon that subject.

Mr. PURCELL: It is agreed that the interest is $421.25.

The COURT: So that, gentlemen of the jury, you will find either of these verdicts, either for the plaintiff in the sum of $2,921.25; or else you find for the defendants.

The foregoing is all the evidence and proceedings had or taken upon the trial of this action.

BROWN & ADAMS AND
WATSON M. ROGERS,
Defendants' Attorneys.

The foregoing case and exceptions are hereby settled as above, and ordered filed in Jefferson county clerk's office, and annexed to the judgment-roll.

P. B. McLENNEN,
Justice Supreme Court.

In Supreme Court.

ANSON E. YORK and WALLACE W. STARKWEATHER *against* WILLIAM W. CONDE and JOHN C. STREETER. } Statement under Rule 41.

Summons and complaint served on Conde July 26, 1890.
47 Summons served on Streeter, July 29, 1890.
Complaint served on Streeter, Aug. 7, 1890.
Answer of defendant Conde served Sept. 12, 1890.
Answer of defendant Streeter served Oct. 4, 1890.

JEFFERSON COUNTY, *ss.*:

C. L. Adams being duly sworn, says he is one of defendants' attorneys in this action, that there has been no change in parties since the commencement thereof, and that no opinion in writing was given in this action by the justice before whom the same was tried.

C. L. ADAMS.

Sworn before me this 21st day of August, 1893.

J. NELLIS,
Notary Public.

At a general term of the supreme court, held at the court-house in the city of Utica, Oneida county, in and for the fourth judicial department of the State of New York, commencing on the 12th day of September, 1893.

Present: Hon. George A. Hardin, presiding justice; Hon. Celora E. Martin, Hon. Milton H. Merwin, associate justices.

ANSON E. YORK and Another, Respondents, *against* WILLIAM W. CONDE and Another, Appellants.

Judgment and order affirmed with costs.

A copy decision.

H. O. FARLEY,
Sp'l Dep. Clerk.

48 At a general term of the supreme court, held at the court-house, in the city of Utica, Oneida county, in and for the fourth judicial department of the State of New York, commencing on the 12th day of September, 1893.

Present: Hon. George A. Hardin, presiding justice; Hon. Celora E. Martin, Hon. Milton H. Merwin, associate justices.

ANSON E. YORK *et al.*, Respondents, *against* WILLIAM W. CONDE and JOHN C. STREETER, Appellants. } Order of Affirmance.

This cause having been brought on for argument at a general term of this court, held in and for the fourth judicial department,

at the court-house in the city of Utica, on the 12th day of September, 1893; after hearing Elon R. Brown, of counsel for the appellants, and Henry Purcell, of counsel for the respondents, and due deliberation having been had thereon,

It is hereby ordered, that the judgment in this action, entered in Jefferson county clerk's office on the 22d day of March, 1893, for $3,370.64 damages and costs, in favor of said plaintiffs and respondents and against the said defendants and appellants, be and the same hereby is in all things affirmed with costs.

A copy of order.

H. O. FARLEY,
Sp'l Dep. Clerk.

Entered.
H. O. FARLEY,
Sp'l Dep. Clerk.

49 Supreme Court.

ANSON E. YORK *et al.*, Respondents,
against
WILLIAM W. CONDE and JOHN C. STREETER, Appellants.

Judgment of Affirmance.
Entered Sept. 30, 1893, at 10.15 a. m.

The appeal taken by the above-named defendants from the judgment entered in this action on the 22d day of March, 1893, in the clerk's office of Jefferson county, in favor of the above-named plaintiffs and against the said defendants, for the sum of three thousand, three hundred and seventy dollars and sixty-four cents ($3,370.64) damages and costs, and from the order herein denying the defendants' motion for a new trial upon the minutes of the trial court, having been brought to a hearing, and heard at the general term of the supreme court, in and for the fourth judicial department of the State of New York, held at the court-house in the city of Utica, N. Y., commencing on the 12th day of September, 1893, and the court, after due deliberation, having made and filed its decision, whereby it affirmed said judgment and order appealed from, with costs; and the plaintiffs' costs and disbursements having been taxed at the sum of $78.75 it is now on motion of Henry Purcell, attorney for the plaintiffs,

Ordered and adjudged, that said judgment and order, so appealed from be, and the same hereby are in all things affirmed; and that the said plaintiffs herein, Anson E. York and Wallace W. Starkweather, recover of the defendants, William W. Conde and John C. Streeter, the said sum of $78.75, their costs and disbursements as taxed, and that plaintiffs have execution therefor.

GEO. H. COBB,
Deputy Clerk.

50 In Supreme Court.

ANSON E. YORK and WILLIAM W. STARKWEATHER, Respondents,
vs.
WILLIAM W. CONDE and JOHN C. STREETER, Appellants.

SIRS: Please take notice that the defendants, William W. Conde and John C. Streeter, hereby appeal to the court of appeals from the judgment and order of the general term of the supreme court entered herein in Jefferson county clerk's office on the 30th day of September, 1893, affirming the judgment entered at circuit in this action in favor of the plaintiffs and against the defendants, for $3,370.64, damages and costs, in Jefferson county clerk's office March 22nd, 1893, and also affirming the order of the circuit denying a new trial entered at the same time in said clerk's office.

Dated Nov. 16th, 1893.

Yours, &c.,

BROWN & ADAMS AND
WATSON M. ROGERS,
Appellants' Attorneys.

To the clerk of Jefferson county and Henry Purcell, Esq.

In Supreme Court.

ANSON E. YORK and Ano.
vs.
WILLIAM W. CONDE and Ano.

STATE OF NEW YORK,
Jefferson County Clerk's Office.

51 I, Frank D. Pierce, clerk of the county of Jefferson, and clerk of the supreme court and county court, which are courts of record in and for said county, do hereby certify that I have compared the notice of appeal to the court of appeals, decision of the general term, judgment of affirmance, and judgment-roll with the originals now on file in this office, and that the same are true and correct transcripts thereof, and of the whole of said originals.

Witness, my hand and seal of office at Watertown, N. Y., this 29th day of December, 1893.

FRANK D. PIERCE, *Clerk.*

In Supreme Court.

ANSON E. YORK and Ano.
vs.
WILLIAM W. CONDE and Ano.

JEFFERSON COUNTY, *ss:*

Elon R. Brown, being duly sworn, says that he is one of the attorneys for the appellants in the above-entitled action, that deponent is informed and verily believes that no opinion was written by the

court at general term or by any member thereof on the affirmance of the judgment in this action by said court.

ELON R. BROWN.

Subscribed and sworn before me this 18th day of December, 1893.

J. NELLIS,
Notary Public.

52 In Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STARKWEATHER, Plaintiffs,
against
WILLIAM W. CONDE and JOHN C. STREETER, Defendants.

MARTIN, *J.*:

The controversy between the parties to this action was as to the priority of their respective rights to the fund in question.

The plaintiffs' claimed title was founded on an assignment to them made by Witherby & Gaffney, March 27, 1890. The defendants' rights were based upon an oral agreement with Witherby & Gaffney, made long before the plaintiffs' assignment, which the defendants contend amounted to an equitable assignment to them of the fund in question.

If the defendants' contention is sustained by the proof, or if the evidence was sufficient to present a question of fact for the jury upon that question, the judgment must be reversed, and no other question need be considered.

The defendants' testimony was to the effect that in or about the month of September, 1889, the firm of Witherby & Gaffney applied to the defendants to endorse the notes of that firm to enable it to procure the money necessary to prosecute the work under its contract with the United States Government; that the defendants agreed to, and did, endorse such notes; that in consideration of such agreement and endorsement by the defendants, said firm expressly agreed that the defendants should have the avails of such contract when it was closed up, with which to pay the notes which should be endorsed by them, and that when the check or draft for the work should be received by said firm, it should be delivered to the defendants to be applied by them in paying such notes.

53 If this agreement was made as testified to, we think as it was founded upon a valuable consideration, it amounted to an equitable assignment of the fund in question, and that the defendants were entitled to receive and use it for the payment of the notes endorsed by them. That such an agreement amounts to an equitable assignment, seems to be well settled in this State. Williams *v.* Ingersoll, 89 N. Y., 508; Fairbanks *v.* Sargent, 104 *id.*, 108; S. C., 117 *id.*, 320. That the defendants subsequently took a written assignment does not affect such rights. The assignment was not invalid because it was oral. Riley *v.* Phœnix Bank of City of New

York, 83 N. Y., 318; Coates *v.* First National Bank of Emporia, 91 *id.*, 20.

We think the court erred in holding as a matter of law, that the defendants acquired no right to the fund in question under their agreement and directing a verdict for the plaintiffs, and that the defendants' exception thereto was well taken.

Judgment reversed on the exceptions and a new trial ordered with costs to abide the event.

Hardin, P. J., and Merwin, J., concurred.

Supreme Court, General Term, Fourth Department.

ANSON E. YORK and Another, Respondents, *against* WILLIAM W. CONDE and Another, Appellants. } Argued September, 1892. Decided November, 1892.

Hardin, P. J.; Martin and Merwin, JJ.

Appeal from a judgment entered in Jefferson county, December 24, 1891, upon a verdict at the Jefferson circuit in favor of
54 the plaintiffs for $2.737.50; also from an order denying a motion on the minutes for a new trial.

Brown & Adams for app'l't Conde.
Watson M. Rogers for app'l't Streeter.
Henry Purcell for respondents.

MERWIN, *J.:*

In the fall of 1889 the firm of Witherby & Gaffney entered into a contract with the United States Government for the construction of certain buildings at Madison barracks at Sacket's Harbor, and thereafter they purchased of the plaintiffs materials for use in the erection of said buildings to such an extent that on the 27th of March, 1890, they were indebted to the plaintiffs thereon in the sum of $3.000. At that date they executed and delivered to plaintiffs an instrument in writing which, after reciting the indebtedness, and that there would be due and payable to them from the Government considerable sums of money before and on the completion of the work, proceeded as follows:

"Now, therefore, of the moneys due and to become due us from the said Government, we do hereby for value received assign and transfer to said York & Starkweather, the sum of three thousand dollars, and do hereby authorize, empower, request and direct Lieut. J. E. Macklin, R. Q. M., Eleventh infantry, U. S. A., through whom payments are made for such construction, to pay to said York & Starkweather on our account for such construction, the full sum of three thousand dollars, as follows: First, $500 from the next estimate and payment due or to become due us, and the sum of $2,500 on the completion of said work by us, and when the balance of our contract with the Government becomes due and payable to us."

On the 12th of May, 1890, Witherby & Gaffney completed the work, and on the 14th of May the agent of the Government de-

livered to them a draft for $4,428, that being the balance due. This was payable to their order and they upon the same day
55 endorsed and delivered it to the defendants, who upon the following day obtained the money thereon. The plaintiffs have received upon their debt $500. The balance of $2,500 and interest they seek to recover in this action. They claim that they were the owners of the proceeds of the draft to the extent of such balance, and that defendants when they received the draft had notice of their claim. The defendants concede that they had notice of plaintiffs' claim, but they insist that the instrument under which plaintiffs make their claim is void under § 3477 of the Revised Statutes of the United States, and also that prior to its date there was a verbal agreement between the defendants and Witherby & Gaffney by which the latter, in consideration that the defendants would endorse their paper and enable them to raise money to carry on the work, agreed that such paper should be paid from the moneys to become due on the contract, and that they would turn over to the defendants the check or draft which they should receive upon the final settlement, so that the defendants might be fully paid for what they endorsed for them or furnished them. Whether there was such an agreement was a question of fact for the jury to determine, under the ruling of this court upon a former appeal. See 61 Hun. 26.

Upon the trial under review it appeared that at the time the defendants received the draft they were liable as endorsers for Witherby & Gaffney to the amount of $4,900, of which $4,200 existed prior to March 27, 1890. Witherby & Gaffney were also indebted to the defendant Conde individually in the sum of $450, of which $205 was incurred after March 27, 1890, and they were also indebted to the defendant Streeter individually $350, and there is evidence that none of this accrued after March 27, 1890. These individual accounts were for moneys or supplies furnished to Witherby & Gaffney in connection with the work. It also appears that the defendants, in disposing of the proceeds of the draft, applied $3,200 in the payment of notes, $250 on the individual account of Conde, $350 on the individual account of Streeter, and the balance of $628 they returned to Witherby & Gaffney. The court held that the United States statutes did not apply, and charged that the plaintiffs were entitled as a matter of law to recover the sum of $1,183,
56 being the items of $628 and $350 above named and also $205 of the item $450. As to the balance of the plaintiffs' claim, its recovery, as the court charged, depended on whether the jury found an oral agreement, as claimed by defendants prior to plaintiffs' agreement. The verdict was for plaintiffs for the full amount, thus negativing the existence of any prior oral agreement with defendants.

By § 3477 of the U. S. Revised Statutes, it is provided that "all transfers and assignments made of any claim upon the United States, or of any part or share thereof or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for

receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

The defendants, in support of their contention that this statute applies here and strikes down the instrument upon which plaintiffs base their rights, rely mainly on the case of Spofford *vs.* Kirk, 97 U. S., 484. In that case Kirk employed Hosmer to prosecute for him a claim against the United States for supplies furnished to the army during the late war, and for damages sustained by reason of the military occupation of his property. Before the allowance of the claim he drew in favor of Wharton an order on Hosmer for a certain amount payable out of any moneys coming into his hands on account of the claim. Hosmer accepted the order and Spofford became its holder in good faith. An award was afterward made to Kirk and a warrant issued in his favor. The latter then refused to recognize the validity of the order or endorse the warrant in the hands of Hosmer. Spofford then filed a bill against Kirk and Hosmer to enforce compliance with the order. It was held that the accepted order was void and gave the holder no interest in the claim against the United States, and no lien upon the fund arising out of the claim, although in the absence of the statute there
57 would be an equitable assignment *pro tanto*. It was said that such an order was not only invalid when set up against the Government, but also as between the parties.

It is, however, claimed by the plaintiffs that subsequent adjudications in the same court have materially modified the rule laid down in the Spofford case. In Goodman *vs.* Niblack, 102 U. S., 556, it was held that the statute did not apply to a transfer by means of a general assignment for the benefit of creditors. It also seems to have been held that in case the Government recognized the validity of such an agreement, the parties to it or those claiming under them would be precluded from setting up that the contract was not assignable. And it was said of the Spofford case that it was a case of transfer or assignment of a part of a disputed claim, then in controversy and it was clearly within all the mischiefs designed to be remedied by the statute, and that a consideration of those mischiefs, as well as a careful examination of the statute, "leave no doubt that its sole purpose was to protect the Government and not the parties to the assignment." In Hobbs *v.* McLean, 117 U. S. 567, one Peck, having put in a bid for a contract which he expected to and did afterwards receive, made an agreement with other parties by which in consideration of moneys to be advanced and services performed by them, he agreed to divide with them a fund he expected to receive from the Government on the contract. This agreement was held not to be affected by the statute and was enforced against the fund in the hands of the assignee of the contractor, and it was said that the purpose of the statute "was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed." In Freedmen's Saving Co. *vs.*

Shepherd, 127 U. S., 494, it was held that the statute did not apply to assignment of a lease and the rents to become due thereunder from the Government, and, the Government having recognized the assignment and paid the rent to the assignee, it was held that the other parties could not complain and that the provisions made in the assignment for the application of the rents should be carried out.

In the light of these cases, the ruling of the court below on
58 this subject should not I think be disturbed. In the course of the trial it appeared that on the 26th of March, 1890, the defendants received from the wife of Gaffney as collateral security for their endorsements a mortgage upon two houses owned by her; that afterwards they foreclosed the mortgage and bid in the property, and had since then realized from the sale of one of the houses $800 which they had applied on the balance remaining of the $4,900 endorsements; that they still held the other house which was encumbered by a mortgage of $700, and was worth $1,500 to $1,600. The court in its charge having referred to the equitable doctrine that a party having a lien upon two funds will, upon the application of a party having a lien upon one of them, be compelled to exhaust his remedy on the other security in the first instance, the defendants' counsel asked the court to charge that that doctrine had nothing to do with this case. To this the court replied: "I can't say that; it is broad enough to engraft upon every case in order to do justice between the parties where the question arises." The defendants duly excepted. This exception was, I think, a good one. The jury were permitted to infer that the right of the defendants to receive the proceeds of the draft at the time they did receive them was diminished or affected by the fact that the defendants then held other security which had not since then been fully exhausted, or that defendants had no right to the proceeds of the draft until such exhaustion. This would naturally lead the jury away from the true question for them to decide which was whether the agreement with the defendants was prior to that with the plaintiffs. If it was, it was not affected or diminished by the fact that when the draft was received, the defendants had other security. The rights of the plaintiffs in respect to such security cannot be determined in this action. Nothing had been realized therefrom at the time the draft was paid.

The court charged that the plaintiffs in any event could recover the sum of $628 which the defendants after they received the proceeds of the draft paid back to Gaffney, and declined to charge that if the jury found that there was a prior equitable lien or assign-
59 ment in favor of defendants to the extent of the whole $4,400 in the check or draft, and it came rightfully to the hands of defendants, it was immaterial to plaintiffs what use it was put to. This should have been charged. For if the defendants had a lien to the full amount, they were entitled to receive the whole and that would necessarily exclude the right of plaintiffs to recover any part of it in this action. Whether the defendants, after they gave back a portion of the fund, could still hold for the same

amount other security which they may have had, is a question that does not here arise. Upon that question the plaintiffs have a full remedy elsewhere.

The court also charged that the plaintiffs were in any event entitled to $205 of the amount allowed upon the individual debt to Conde. The full amount of his debt was $450. Of this, $205 was incurred after the date of the agreement with plaintiffs. The $250 was applied generally upon the account. There was evidence tending to show that the agreement between defendants and Witherby & Gaffney covered the individual account of Conde as well as the endorsements. If so, I fail to see how as matter of law it should be said that plaintiffs could recover the $205. Exception was duly taken to the charge and refusal to charge above referred to.

The plaintiff York being upon the stand as a witness in his own behalf was allowed to testify what he told the defendant Conde that he would take rather than have any suit about it, in other words his offer of compromise. Objection and exception were duly taken. This was immaterial, and in a close case might have an improper effect upon a jury.

It follows that there should be a new trial.

Hardin, P. J., and Martin, J., concur.

Judgment of order reversed upon the exceptions and new trial ordered, costs to abide the event.

60 At a special term of the supreme court held at the court-house in the city of Watertown, N. Y., on the 30th day of November, 1895.

Present: Hon. P. C. Williams, justice presiding.

Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STARKWEATHER
ag'st
WILLIAM W. CONDE and JOHN C. STREETER.

This cause having been brought on upon the remittitur herein sent down from the court of appeals and now filed in this court, by which remittitur it appears that an appeal was taken by the defendants from a judgment of this court to the said court of appeals, and that such judgment on the said appeal has been affirmed by the said court of appeals, with costs, and that the record and proceedings had been directed by said court of appeals to be remitted to this court, and this court directed to enforce the said judgment of the court of appeals according to law: Now, on reading and filing the said remittitur and on motion of Henry Purcell, attorney for the plaintiffs—

It is ordered and adjudged that the said judgment of the said court of appeals be, and the same hereby is, made the judgment of this court, and that the plaintiffs have execution against the defendants for the said costs of appeal when adjusted by the clerk of this

court and inserted herein, as well as for the amount adjudged
61 to be recovered in and by the judgment of this court in this cause entered in the clerk's office of Jefferson county on March 22nd, 1893, and that this order be annexed to the judgment-roll.

Enter.

WILLIAMS, *J.*

Entered Nov. 30, 1895, 11.55 a. m.

F. D. PIERCE, *Clerk.*

62 Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STARKWEATHER *ag'st* WILLIAM W. CONDE and JOHN C. STREETER.	Judgment, Nov. 30, 1895, 11.55 a. m.

A judgment in this action in favor of the above-named plaintiffs against the above-named defendants having been rendered in this court on March 22nd, 1893, upon the verdict of a jury, for thirty-three hundred seventy and $\frac{64}{100}$ dollars, damages and costs, which judgment was subsequently reduced on a retaxation of costs to the sum of thirty-two hundred ninety-five and $\frac{64}{100}$ dollars, and the defendants having appealed from said judgment to the general term of this court, fourth department, and the said judgment having been by said court in all things affirmed, and judgment of affirmance having been rendered thereon and entered in the clerk's office of said county on September 30th, 1893, affirming said judgment and for seventy-eight and $\frac{75}{100}$ dollars, costs, and the defendants having thereupon appealed to the court of appeals, and the said court of appeals having since sent hither its remittitur filed herein the 30th day of November, 1895, by which it appears that the said court of appeals has affirmed the said judgment in all things, with costs, and has given judgment accordingly, and has remitted the judgment of the said court of appeals to this court, to be enforced according to law, and this court having by an order entered
63 herein the 30th day of November, 1895, ordered that said judgment be made the judgment of this court, with costs, and the same having been adjusted by the clerk of this court at the sum of $117.72, it is now, on motion of Henry Purcell, the attorney for the plaintiffs—

Ordered and adjudged that the judgment of the said court of appeals be, and the same is hereby, made the judgment of this court, and that the plaintiffs recover of the defendants the said sum of $117.72, costs of said appeal to the court of appeals, and that they have execution therefor, as well as for the amount adjudged to be recovered by the said plaintiffs in and by the judgment of this court entered in this cause on said March 22nd, 1893, less the said sum of seventy-five dollars, by which said judgment was reduced on the retaxation of costs therein, as above mentioned.

F. D. PIERCE, *Clerk.*

64 Court of Appeals.

ANSON E. YORK *et al.*, Respondents,
vs.
WILLIAM W. CONDE *et al.*, Appellants.

Appeal from judgment of the general term of the supreme court in the fourth judicial department entered upon an order made September 12, 1893, which affirmed a judgment in favor of plaintiffs entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Elon R. Brown, for appellants; Henry Purcell, for respondents.

ANDREWS, *Ch. J.:*

The determination of this appeal depends upon the true construction of section 3477 of the Revised Statutes of the United States. The general facts may be briefly stated. The firm of Witherby & Gaffney were contractors with the United States for building barracks at Sacket's Harbor. The plaintiffs constituted the firm of York & Starkweather and furnished to the contractors lumber and materials for the work of the value of $3,000 and upwards, which were used in the construction. During the progress of the work and before its completion, and on the 27th day of March, 1890, Witherby & Gaffney made a written assignment to York & Starkweather of $3,000 "of the money due and to become due" to the assignors from the Government on their contract to apply on their indebtedness to the assignees for the lumber and ma-
65 terials so furnished, and authorized the disbursing agent of the Government, through whom the payments on the contract were made, to pay the plaintiffs $500 from the next estimate thereafter and $2,500 on the completion of the contract, and when the balance coming to the assignors should become payable to them. Witherby & Gaffney paid the plaintiffs $500, but no further payment has been made to them. On May 15, 1890, the contract having been completed, the disbursing officer delivered to Gaffney, one of the contractors, a draft for $4,400 in payment of the amount unpaid on the contract, which he delivered on the same day to the defendants to secure them for liabilities, as indorsers and otherwise, previously incurred for the benefit of Witherby & Gaffney. The defendants, before they had parted with the draft, were notified by the plaintiffs of their claim and of the terms of the assignment to them, and they demanded that the defendants should pay them out of said draft the sum of $2,500, the amount remaining unpaid to them from Witherby & Gaffney, which the defendants refused to do. This action was thereupon brought to recover said sum.

The claim set up by the defendants in their answer that prior to the assignment to the plaintiffs Witherby & Gaffney had verbally assigned to them the money to become due on the contract as security for their indorsements was tried before the jury and found

against them and need not be further considered. There can be no doubt that under the general rule of law prevailing in this State the plaintiffs, under the assignment of March 27, 1890, acquired an equitable, if not a legal, title to the money payable on the contract of Witherby & Gaffney with the Government to the extent of $3,000, and that the defendants, having acquired possession of the draft for the final payment on the contract by delivery from
66 Witherby & Gaffney to secure an antecedent liability, on being notified of the claim of the plaintiffs, held the draft and the fund it represented, as trustee of the plaintiffs, to the extent of their claim. (Field *v.* Mayor, &c., 6 N. Y., 179; Devlin *v.* Mayor, &c., 63 *id.*, 8.)

But the contention is that the plaintiffs took nothing under the assignment to them because, as is claimed, the transaction was void under section 3477 of the Revised Statutes of the United States, to which reference has been made. That section is as follows: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same."

This section has been considered in several cases by the Supreme Court of the United States. If that court has construed the section so as to determine the point involved in this case we should
67 deem it our duty to follow its decision. The judgment we shall render will not, we suppose, be subject to review by the Supreme Court. We do not question the validity of the section in question nor will our decision affect any right of the defendants based thereon. Their right, if any, rests upon the transfer of the draft after it came to the hands of Witherby & Gaffney. They seek to defeat the right of the plaintiffs under their prior assignment of a portion of the fund and invoke section 3477 to establish that the assignment was void and conferred no right; but on a question of statutory construction of an act of Congress which has been determined by the Supreme Court of the United States, subsequently arising in this court, we should feel bound to adopt and follow the construction of that tribunal on the principle of comity, although in a case where the ultimate jurisdiction is vested in this court. This principle is especially important to be observed in such a case in view of the relation between the Federal and State courts, not exercising in all cases

a co-ordinate jurisdiction, but engaged in the administration of justice to a great extent between persons who are citizens both of a State and of the United States. The decisions of the tribunals of a State as to the true construction of the statutes of its own sovereignty are followed by the Federal courts, and it would be most unseemly and produce great confusion if State courts should refuse to adopt the construction of the Supreme Court of the United States of Federal statutes.

The section in question was taken from the act of Congress approved February 26, 1863, entitled "An act to prevent frauds on the Treasury of the United States." Its object was to protect the Government. It was enacted, as was said by Mr. Justice Miller in Goodman *v.* Niblack (102 U. S., 556), to prevent embarrass-
68 ments to the Government which might arise if it was compelled to recognize rights of third persons not parties to the original contract or transaction, and, second, to shut the door to improper influences in prosecuting claims before the departments or courts or Congress.

There are two theories of construction of the statute. One is that which gives the widest meaning to the words and which makes a transfer or assignment of a claim or interest void not only as to the Government and its officers, but as to the parties to the transfer or assignment. Upon this theory the money, when paid over to the original claimant, cannot be reached in his hands unless, after the allowance of the claim and the issuing of a warrant for its payment, the provisions of the section were complied with. This theory wholly forbids the acquisition before this has been done of any right in the fund through any transfer or assignment, however formal the instrument or however just and innocent the transaction. The other theory is that the objects of the statute are accomplished by a construction which makes an assignment or transfer made before the allowance of a claim void as between the claimant and the Government, but leaves the transferee, after the fund has come to the hands of the claimant, to assert such legal rights against the fund and avail himself of such legal remedies to enforce them as exist in other cases of transfer.

The Supreme Court has consistently maintained that a transfer or assignment made before the allowance of a claim was void at the election of the Government, and that as against the assignee or transferee the Government may wholly disregard it, and that payment made to the original claimant by the Government is a good acquittance of the liability, although it had notice of the transfer at the time; but the court has also decided that the
69 Government may recognize such a transfer, and that payment to the transferee will protect it against any subsequent claim of the original party (Bailey *v.* U. S., 109 U. S., 432). The principal case relied upon by the defendants to sustain their contention is Spofford *v.* Kirk (97 U. S., 484), and if what Mr. Justice Miller, in Goodman *v.* Niblack (*supra*), characterizes as the strong language of the opinion in that case is to have the broadest application there would be difficulty in holding that the assignment now in question

can be upheld; but the transfer under consideration in Spofford *v.* Kirk was of part of a disputed claim then in controversy between the claimant and the Government. The court soon began to depart from the rigid interpretation of the statute indicated in Spofford *v.* Kirk. In Goodman *v.* Niblack (*supra*) it was held that the statute did not embrace the case of a voluntary general assignment by an insolvent for the benefit of his creditors, and that a claim existing against the Government in favor of the assignor passed by the assignment. Mr. Justice Miller, in his opinion, referring to the statute, said: "Its sole purpose was the protection of the Government and not that of the parties to the assignment." The case of Hobbs *v.* McLean (117 U. S., 567) shows a further relaxation of the strict rule declared in Spofford *v.* Kirk, and the court, referring to sections 3737 and 3477 of the Revised Statutes, after stating that they were passed for the protection of the Government, said: "The purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed." The case of Freedman's Savings and Trust Co. *v.* Shepherd and Shepherd *v.* Thompson (127 U. S., 494) has an important bearing upon the present case. The facts are complicated.

70 The question related to the conflicting claims of parties to two drafts which had been issued and delivered by the Government to an attorney for rent under a lease of premises made by one Bradley to the Government in 1873, and to another sum of $787.50 paid by the Government to a receiver for rent of the same premises after June 6, 1878. One of the drafts was for rent for the year ending June 30, 1876, and the other for the rent for two years prior to June 30, 1878. Thompson, one of the parties to the action, claimed to be entitled to the drafts as pledgee of the rents under an agreement dated June 21, 1877, made between him and Bradley, the original lessor, and Shepherd, his grantee. At the date of the pledge a suit was pending against the United States to recover the rent for the year ending June 30, 1876, in favor of Bradley. The case was finally decided in his favor in October, 1878. During the pendency of the suit a suit was brought for the rent for the two years ending June 30, 1878, and the second draft was given in settlement of that suit. Enough has been stated to show that Thompson claimed under a pledge made, not only before an allowance of the rent due June 30, 1876, but while a suit against the United States was pending for its recovery, and that only part of the rents for the years 1877 and 1878, included in the pledge, for which the second draft was given, had become due when the pledge was made. Thompson's right to the drafts was contested under section 3477 of the Revised Statutes, the claim being that the pledge was void. But this objection was overruled and the court sustained Thompson's claim to the drafts, and on appeal the judgment was affirmed. Mr. Justice Harlan, in pronouncing the opinion of the court, said: "The simple question is whether the money received from the Government shall be diverted from the purpose to which Bradley,

71 Shepherd, and Shepherd's trustees agreed in writing that it should be devoted, namely, the payment of the debts Thomp-

son holds against Shepherd. This question must be answered in the negative, and in so adjudging we do not contravene the letter or spirit of the statute." The case, although many more circumstances appear than are here stated, seems to us to go far in sustaining the claim of the plaintiffs in the present action. We think that the question cannot be said to have been decided adversely to their contention in the Federal Supreme Court. In our opinion a just construction of the statute does not invalidate the transfer of Witherby & Gaffney to the plaintiffs, nor will the objects of the statute be defeated by the construction that such a transfer, made in the legitimate and usual course of business, in good faith, to secure an honest debt, while it may be disregarded by the Government, is good as between the parties so far as to enable the transferee, after the Government has paid over the money to the claimant, to enforce as against him or those who take with notice the interest or lien given by the assignment. The fact that the Government may refuse to recognize any transfer or assignment, in connection with the general principle of law, which avoids all agreements contrary to public policy, will be a sufficient discouragement to illegitimate transactions, or, at all events, it is all the law can justly interpose, having due regard to the exigencies of business and the protection of innocent parties.

The supreme court of Massachusetts, in Jernegan *v.* Osborne (155 Mass., 207), reached substantially the same conclusion as that to which we have arrived.

The judgment should be affirmed.

All concur except O'Brien, J., not sitting.

Judgment affirmed.

Endorsed on cover: Case No. 16,216. New York supreme court. Term No., 143. William W. Conde and John C. Streeter, plaintiffs in error, *vs.* Anson E. York & Wallace W. Starkweather. Filed March 11, 1896.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1897.

No. 143.

WILLIAM W. CONDE and JOHN C. STREETER,
PLAINTIFFS IN ERROR,

against

ANSON E. YORK and WALLACE W. STARKWEATHER, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

ELON R. BROWN,
Counsel for Plaintiffs in Error,
31 35 Savings Bank Building,
Watertown, N. Y.

WATERTOWN, N. Y.:
O. E. HUNGERFORD, ARCADE STREET.
1897.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

UNITED STATES SUPREME COURT.

WILLIAM W. CONDE AND JOHN C. STREETER, PLAINTIFFS IN ERROR,

vs.

ANSON E. YORK AND WALLACE W. STARKWEATHER, DEFENDANTS IN ERROR.

Brief for Plaintiffs in Error.

STATEMENT.

This case is brought into the Supreme Court on a writ of error for the purpose of reviewing a judgment of the New York Supreme Court, entered in Jefferson County for $2921.25 damages, and $449.39 costs, amounting in all to $3,370.64, which judgment was in favor of the defendants, in error, and against the plaintiffs, in error. This judgment was reviewed on appeal by the Court of Appeals, where it was affirmed, (147 N. Y., 486) and the opinion of the Court of Appeals is contained in the record.

The facts in this case are undisputed, and are as follows:

In September, 1889, the firm of Witherby & Gaffney, contractors and builders, entered into a contract with the Government of the United States to construct certain buildings, known as Officers' Quarters, at Madison Barracks, Sackets Harbor, N. Y. Thereafter, the plaintiffs in this action, at the request of Witherby & Gaffney, sold and delivered to them on credit, lumber and building material which were used in the construction of said buildings, and were of the value of more than $3,000. Being so indebted, Witherby & Gaffney, before the completion of the contract, and on March 27, 1890, executed an assignment to the plaintiffs, of $3,000 of the moneys which should thereafter become due and owing to them from the Government, to be applied in part payment of their said indebtedness.

The instrument of assignment is as follows:

"Whereas, we have a contract with the United "States Government for the construction of build-"ings and Officers' Quarters at Madison Barracks, "Sackets Harbor, Jefferson County, N. Y.

"And whereas, we are indebted to York & Stark-"weather, of Watertown, N. Y., in the sum of three "thousand dollars and more on account of ma-"terials furnished us by them, that were used in "said buildings and quarters.

"And whereas, there will be due and payable to "us on account of our work, etc., from the Govern-"ment considerable sums of money before and on "the completion of our said; work

"Now, therefore, of the moneys due and to be-
"come due us from the said Government, we do
"hereby, for value received, assign and transfer to
"said York & Starkweather, the sum of three
"thousand dollars, and do hereby authorize, em-
"power, request and direct Lieut J. E. Macklin, R.
"Q. M., Eleventh Infantry, U. S. A., through whom
"payments are made for such construction, to pay
"to said York & Starkweather, on our account for
"such construction, the full sum of three thousand
"dollars, as follows: First, $500 from the next es-
"timate and payment due or to become due us, and
"the sum of $2,500 on the completion of said work
"by us, and when the balance of our contract with
"the Government becomes due and payable to us.

"Dated March 27th, 1890.

[L. S.] WITHERBY & GAFFNEY.

"Signed, sealed and delivered in the presence of
Orrin J. Robinson,
(p. 8.) Ira Gardiner."

Leiut. Macklin was the quartermaster and disbursing agent of the United States Government at Sackets Harbor (p. 30). He refused to recognize the assignment and gave a draft on the Treasury, covering the moneys specified in the assignment, to Mr. Gaffney, one of the assignors, on May 15, 1890, and on the same day Gaffney turned the draft over to Conde for the benefit of Conde and his co-plaintiff in error, Streeter, (p. 23) and the money was applied by them, with the exception of $628, which was paid back to Gaffney, in discharge of liabilities incurred by Streeter and Conde as endorsers for Witherby & Gaffney, made to enable Witherby & Gaffney to raise money to complete the contract pp. 23,28). Conde was also a surety to the Government on the contractors' bond for the faith-

ful performance of the contract by Witherby & Gaffney (p. 24).

Two defenses were set up by Conde & Streeter, each answering separately. The second defense in the answers, and the only one to be considered on this appeal, alleged (pp. 12, 15) that the assignment by Witherby & Gaffney to York & Starkweather was of a claim against the United States Government, and that the same had not at the time of the assignment been allowed, or the amount due thereon ascertained. That no warrant had been issued for the payment thereof, and that it did not recite the warrant for payment issued by the Government, and was not acknowledged by the person making the same, before an officer having authority to take acknowledgements of deeds, and that the said assignment was in violation of the laws of the United States and of the State of New York, and particularly of Section 3,477 of the Revised Statute, U. S., and of sub-division 3 of Section 1,910, N. Y. Code Civil Procedure.

All the evidence and proceedings on the trial, so far as they relate to this defense are set forth pages 18 to 20 of the Transcript of Record. At the close of the plaintiffs' case (p. 20) each of the defendants moved separately, in his own behalf, for a non-suit, on the ground "that the plaintiff has "failed to make out a cause of action against him, "and on the ground that the original transfer or "assignment of this claim against the United "States Government was void upon its face, under

"Section 3,477, and other related sections of the "Rev. Stat., U. S." This motion was denied and each defendant excepted.

The other defense, to which most of the evidence taken on the trial relates, was that the defendants, Streeter and Conde, held an oral equitable assignment of the same moneys referred to in the assignment to York & Starkweather, which had been executed at a time prior to the date of the written assignment upon the occasion of the endorsement of the notes for the accommodation of Witherby & Gaffney. Upon this second issue, the defendants were beaten upon the trial, the verdict of the jury being against them.

The only question in the case is, whether Section 3,477 of the Revised Statutes of the United States prohibits and renders void the assignment from Witherby & Gaffney to York & Starkweather of an interest in the claim of Witherby & Gaffney against the United States for the construction of Officers' Quarters at Madison Barracks, Sackets Harbor, N. Y. That section reads as follows:

"All transfers and assignments made of any "claim upon the United States, or of any part or "share thereof, or interest therein, whether abso- "lute or conditional, and whatever may be the con- "sideration therefor, and all powers of attorney, "orders or other authorities for receiving payment "of any such claim, or of any part or share thereof, "shall be absolutely null and void, unless they are "freely made and executed in the presence of at

"least two attesting witnesses, after the allowance "of such a claim, the ascertainment of the amount "due, and the issuing of a warrant for the payment "thereof. Such transfers, assignments, and pow- "ers of attorney, must recite the warrant for pay- "ment, and must be acknowledged by the person "making them, before an officer having authority "to take acknowledgements of deeds, and shall be "certified by the officer; and it must appear by the "certificate that the officer, at the time of the ack- "nowledgement, read and fully explained the "transfer, assignment or warrant of attorney to "the person acknowledging the same."

As the assignment shows upon its face that it is not acknowledged, and does not recite the warrant for payment, and expressly declares that it was intended to reach moneys that are to become due and which have not yet been allowed, it is clear that it does not conform to the conditions of this section. If the assignment, therefore, is within the terms of this section, it is void. The courts below have held that Section 3,447 does not cover or apply to the assignment in question.

This statute is the successor of an act to Congress, approved February 26, 1853, entitled "An "Act to prevent frauds upon the Treasury of the "United States," and of an act of July 29, 1846, entitled, "An Act in relation to the payment of "claims." See Gould's & Tucker's notes on Rev. Stat., U. S., Section 3,447, and U. S. vs. Gillis, 95, U. S., 407.

Reverdy Johnson, when Attorney General, (1849), 5 Op. Atty. Gen. U. S., 85, writing in Satterlee Clark's claim, which was being prosecuted before Congress, held that it was not assignable before allowance under the provisions of the Act of July, 1846. He says:

"It provided that no claim thereafter allowed by "resolution or Act of Congress, and directed to be "paid shall, nor shall any part thereof be paid to "any person or persons other than the claimant or "his executor, or administrator, unless such person "or persons shall produce a warrant of attorney "executed after the passage of such resolution or "Act, expressly reciting the amount allowed, and "be attested by two witnesses, and acknowledged "by the party making it before an officer having "authority to take acknowledgement of deeds."

POINTS.

I.

The purpose of this statute is to prohibit and render void every voluntary assignment or the transfer of a claim against the United States.

U. S. v. Gillis, 95 U. S., 407.
Spofford v. Kirk, 97 U. S., 484
McKnight vs. U. S., 98 U. S., 197.
St. Paul & Duluth R. R. Co. v. U. S., 112 U. S., 733.
Hager v. Swayne, 149 U. S., 242.
Ely v. U. S., 19 Ct. Clms., 658, 664.
Johnston v. U. S., 13 Ct. Clms., 217, 224.
Belt v. U. S., 15 Ct. Clms., 92, 110.
Forehand v. U. S., 23 Ct. Clms., 477.

5 Op. Atty. Gen. U. S., 85.
16 Op. Atty. Gen. U. S., 261.
16 Op. Atty. Gen., 191.
Lopez v. U. S., 24 Ct. Clms., 84.
Howes v. U. S., 24 Ct. Clms., 170.
Harris v. U. S., 27 Ct. Clms., 177.
Becker v. Sweetzer, 15 Minn., 427.
Emmons, 42 U. S., Fed., Rep., 26.
Hitchcock v. U. S., 27 Ct. Clms., 185.
Trist v. Child, 21 Wall, 441, 447.
Newell v. West, 149 Mass., 520.
McKee v. Cochrane, 17 Washington Law Reporter, 219 (Supreme Court, District of Columbia, 1889).
Woods v. Dickinson, 18 Washington Law Reporter, 5 (District of Columbia, 1889).

In Hager vs. Swayne, 149 U. S., 242, it is decided that the assignment of a claim against the United States for an excess of duties paid on the importation of merchandise, is void. Chief Justice Fuller says in that case (p. 247):

"By Section 3,477, all transfers and assignments "made of any claim upon the United States, or of "any part or share thereof, or interest therein, "whether absolute or conditional, and whatever "might be the consideration therefor, and all pow- "ers of attorney, orders or other authorities for "receiving payment of any such claim, or of any "part or share thereof, were declared to be abso- "lutely null and void, unless they were freely made "and executed in the presence of at least two "attesting witnesses, after the allowance of such a "claim, the ascertainment of the amount due, and "the issuing of a warrant for the payment thereof. "The language is general which declares the nul- "lity of such assignments, and the only cases "where they are recognized is where a warrant has "already been issued. If there are any cases

"where the claim cannot be paid by warrant, then "they do not come within the exception, but are "affected by the general language. 16 Op. Atty. "Gen., 261.

"The mischiefs designed to be remedied by this "section were declared by Mr. Justice Miller in "Goodman vs. Niblack, 102 U. S., 556, to be mainly "two; first, the danger that the rights of the Gov- "ernment might be embarrassed by having to deal "with several persons instead of one, and by the "introduction of a party who was a stranger to the "original transaction; second, that by a transfer "of such claim against the Government to one or "more persons not originally interested in it, the "way might be conveniently opened to such im- "proper influences in prosecuting the claim before "the Departments, the Courts or the Congress, as "desperate cases, where the award is contingent "on success, so often suggest.

"It has been frequently held that the section "does not include transfers by operation of law, or "by will, in bankruptcy or insolvency. Butler vs. "Gorley, 146 U. S., 203, and cases cited. But the "legislation shows that the intent of Congress was "that the assignment of naked claims against the "Government for the purpose of suit, or in view of "litigation or otherwise, should not be counten- "anced. At common law, the transfer of a mere "right to recover in an action at law was forbidden "as violating the rule against maintenance and "champerty, and although the rigor of that rule "has been relaxed an assignment of a chose in ac- "tion will not be sanctioned when it is opposed to "any rule of law or public policy."

U. S. vs. Gillis, where this act was first construed by the Supreme Court arose upon the transfer of a claim against the Government for cotton seized during the war. The claim had been assigned to Gillis by the owner of the cotton, and he had pro-

secuted in the Court of Claims. Mr. Justice Strong, writing for the Court, held that the statute embraced all claims of every name and nature against the United States, and the claimant was defeated in his action on the ground that the statute prohibited the transfer or assingment, and made it void.

In McKnight vs. U. S., 98 U. S., 179, on an appeal from the Court of Claims, it appeared that the claim against the United States had been allowed by the proper officers and assigned, and a part thereof paid to the assignee, when the payment of the balance was refused on the ground of a liability from the claimant to the United States on an official bond in another matter. The assignee brought suit against the United States for the balance, and the Court, Mr. Justice Swayne, writing the opinion, decided that the assignment was wholly void, (the payment of a part of the claim to the assignee not estopping the United States from avoiding it as to the balance), and that payment of the balance could be successfully resisted by the Government.

In St. Paul & Duluth R. R. Co. vs. U. S., 112 U. S., 733, it was determined by the Supreme Court, Mr. Justice Matthews writing the opinion, that a voluntary transfer of a claim against the United States by way of mortgage, and the completion of that transfer by judicial sale under the mortgage, is within the provision of Section 3,477, and is void. The case is sometimes referred to under the

title of Flint & Pere Marquette R. R. Co vs. U. S., cited at the end of the opinion, (p. 737).

In Emmons vs. U. S., 42 Federal Reporter, 26, it was held that assignments of claims for the purchase price paid upon void entries upon public lands are void under Section 3,477. (Judge Hanford, Oregon Circuit, April, 1890).

In the Court of Claims and the Attorney General's office this principle has been uniformly recognized.

In Hitchcock vs. U. S., 27 Ct. Cls. 185 (1892), there was a contest between a bank, which had advanced money to aid a contractor in doing government work and taken as security an assignment of the final payment which was to be made to the contractor upon the completion of the contract, and the surety who had completed the contract, on failure of the contractor to do so. Held that although the bank was expressly authorized by the instrument "to receive our last estimate from the "United States on our contract for erection of United States Custom House at Galveston," that such provision was absolutely void under Section 3,477, and that the surety was entitled to recover the full amount due.

This case resembles the case at ~~the~~ bar. York & Starkweather were material men who had fur-

nished materials to Witherby & Gaffney to be used in the construction of the barracks. Conde was a surety upon the bond, and advanced moneys to enable Witherby & Gaffney to perform the contract so that he might not be held upon the bond.

In Ely vs. U. S., 19 Ct. Cls., 658, 664, it is held that where a vessel is lost in the service of the United States, the claims of the owners against the Government cannot be assigned by reason of Section 3,477.

In Johnson vs. U. S., 13 Ct. Cls., 217, 224, it is held that a claim for a threshing machine sold to an Indian agent cannot be enforced by the assignee by reason of Section 3,477.

In Forehand vs. U. S., 23 Ct. Cls., 477, 482, (1888), it was held that a claim for the use of an invention by the United States would be defeated, if prosecuted by the assignee, under the provisions of Section 3,477.

Attorney Gen. Devens, in 16 Op. Atty. Gen. U. S., 261, held that an irrevocable power of attorney to collect pay for dredging a river for the Government may be revoked by the contractor at will as void under Section 3,477. (See also opinion in Eads case, 16 Op. Atty. Gen., 153.)

In 16 Op. Atty Gen., 191, Attorney General Devens held that where an approved voucher for transportation in the navy department had been issued, assigned, and the assignment repudiated, such an assignment was void under Section 3,477, and

could be repudiated and payment made to the original contractors.

In Howes vs. U. S., 24 Ct. Cls., 170, it is decided that an attachment by a creditor of a claim against the United States in a proceeding in the nature of a creditor's bill, whereby the title of the particular claim is sought to be acquired under a State law, is ineffectual to work a transfer or devolution of such claim by reason of the provisions of Section 3,477.

In Harris vs. U. S., 27 Ct. Cls., 177 (1892), it is adjudged that an assignment of a voucher given to a blacksmith for work done on an Indian reservation, although made for a valuable consideration, is void under Section 3,477.

II.

The assignment by Witherby and Gaffney to York and Starkweather was within the purview of the statute and illustrates both mischiefs which the statute was enactad to re medy.

(1). The assignment to York & Starkweather raised a conflict at the time of payment, with Witherby & Gaffney, the original claimants, who in fact received the money from the Government, because the Quartermaster, relying upon the statute, refused to recognize the assignment (p. 23).

(2). The assignments to Conde and Streeter, two in writing and one oral, which have been the subject of litigation in the State Court, further illustrate the danger and inconvenience of the

Governments' recognizing any assignment (pp. 8, 9, 12, 13).

(3). By these various assignments the assignees became interested in pushing this claim, and it turns out that an act has actually been passed by Congress for the relief of Witherby & Gaffney, approved March, 1895, entitled an "Act "for the Relief of Witherby & Gaffney." Nothing is intended against the good faith of the defendants in error by this reference to an Act of Congress. It is only on illustration of what may be done under the stimulus afforded by the assignment of a part of a claim. The fact remains that no relief was granted against the amount in controversy in this action.

The ruling of the Court of Appeals on this point is: "In our opinion a just construction of the stat- "ute does not invalidate the contract of Witherby "& Gaffney to the plaintiffs, nor will the object of "the statute be defeated by the construction that "such a contract made in the legitimate and usual "course of business, in good faith, to secure an "honest debt, while it may be disregarded by the "Government, is good as between the parties, so "far as to enable the transferee, after the Govern- "ment has paid over the money to the claimant, "to enforce as against him or those who take with- "out notice, the interest or lien given by the assignment.

The principle here laid down would permit most of the mischiefs which the statute was designed to remedy. Under such a construction, the statute would be fully satisfied by the Government's pay-

ment to the original claimant who would be subject the instant he received it, to a suit in equity to enforce every lien and claim against the moneys in his hands which might have been created by him in defiance of the statute. He would be subject to a remedy by injunction to prevent him from disposing of them when they were received by him. He could be attacked in federal or state courts. Such a ruling would have enabled every assignee and lienor, who has hitherto been defeated by a judgment of the Court, to make the assignment as effectual as if the judgment had not been rendered. He had only to put the machinery of the law in motion the instant the funds were paid over, or as in this case, to pursue the funds in the hands of a third party. This would be a clear evasion of the statute.

III.

Section 3477 may be invoked against prohibited assignments, by the original claimants or persons subsequently and lawfully acquiring an interest in payments from the Government. The privilege is not limited to the Government.

Spofford v. Kirk, 97 U. S., 484.
Trist v. Child, 21 Wall, 441, 447.
McKee v. Cochrane, 17 Washington Law Reporter, 219 (Supreme Court Dist. Columbia 1889).
Woods v. Dickinson, 18 Washington Law Reporter, 5 (Dist. Columbia, 1889.)
Becker v. Sweetzer, 15 Minn , 427.
Newell v. West, 149 Mass., 520.

In Spofford vs. Kirk, 97 U. S., 484, an attorney was employed to collect a claim against the United

States for twelve thousand dollars for supplies furnished to the army during the war of the rebellion. While the claim was pending uncollected, the owner of it gave an order on his attorney, who was prosecuting it, to a third party, requesting the payment of a portion of it to the payee when it was collected. The attorney accepted the order. When the collection had been made and was in the hands of the attorney, the claimant repudiated the order, setting up Section 3,477 in avoidance of it. The accepted order had been transferred to a third party, who had bought it in good faith, and who then proceeded to assert his rights by a suit in equity against the attorney and the claimant. The Court followed the decision in U. S. vs. Gillis, Mr. Justice Strong writing the opinion.

This was a judgment between private parties, in an action to which the Government was not a party. It should be conclusive on this appeal unless overruled by later cases. It was decided by the Court below that it had been overruled by the following cases:

Goodman v. Niblack, 102 U. S., 556.
Hobbs v. McLean, 117 U. S., 567.
Freedman's Saving & Trust Co. v. Shepard, 127 U. S., 494.
Jernegan v. Osborne, 155 Mass., 207.

Goodman vs. Niblack: In this case a contractor, having a contract with the United States, agreed with another that the latter should perform it, and that there should be an equal division

of the profits. Both parties entered into an agreement with a trustee and assigned the contract to him for the due fulfillment of their bargain. Upon a dispute arising as to the amount due, Congress authorized the trustee, by special Act, to sue the United States therefor, and made an appropriation to pay the judgment which he recovered. The Court held in an opinion by Mr. Justice Miller, that the assignment having been recognized by the government, the parties to the agreement and those claiming under them, were precluded from setting up that the contract was not assignable. It was also decided that an assignment for the benefit of creditors stood on the same ground as an assignment in bankruptcy, and was not within the prohibition of Section 3,477.

This was only following Erwin vs. U. S., 97 U. S., 392, decided at the same term as Spofford vs. Kirk, in which the doctrine was laid down that the statute does not cover assignments in bankruptcy or insolvency or transfers to heirs or legatees, or by other involuntary devolution. (Butler vs. Goreley, 146 U. S., 303; Redfield vs U. S., 27 Ct. Clms., 393; McKay vs. U. S., 27 Ct. Clms., 422; Morgan vs. U. S., 4 Ct. Clms., 319, 331).

That part of the judgment in Goodman vs. Niblack, holding that the voluntary transfer to the trustee was valid, was based upon a special Act of Congress, recognizing the assignment, and by thus recognizing it, taking it out of the provisions of Section 3,477. (See also 47 N. J. Equity, 488,

Chap. 15, U. S. Statutes at Large, Vol. 22, p. 4; Jernegan vs. Osborne, 155 Mass., 207).

That it was not the intention of the Supreme Court to overrule Spofford vs. Kirk, or to intimate that a different judgment should have been rendered on the facts then appearing, is made clear by Judge Miller's opinion, 102 U. S., 559:

"It is understood that the Circuit Court sus-
"tained the demurrer under pressure of the strong
"language of the opinion in Spofford vs. Kirk. We
"do not think, however, that the circumstances of
"the present case bring it within the one then un-
"der consideration, or the principles there laid
"down. That was a case of the transfer or assign-
"ment of a part of a disputed claim, then in contro-
"versy, and it was clearly within all the mischiefs
"designed to be remedied by the statute. Those
"mischiefs, as laid down in that opinion, and in
"the others referred to, are mainly two:

"First—The danger that the rights of the Gov-
"ernment might be embarrassed by having to deal
"with several persons instead of one, and by the in-
"troduction of a party who was a stranger to the
"original transaction.

"Second—That by a transfer of such a claim
"against the Government to one or more persons
"not originally interested in it, the way might be
"conveniently opened to such improper influences
"in prosecuting the claim before the departments,
"the courts or the Congress, as desperate cases,
"when the reward is contingent on success, so
"often suggest.

"Both the considerations, as well as a careful
"examination of the statute, leave no doubt that
"its sole purpose was to protect the Government,
"and not the parties to the assignment. Erwin vs.
"United States (supra), decided at the same term
"as Spofford vs. Kirk, is suggestive on this point.

"It was there held that the claim of a bankrupt "against the United States passed by the assign- "ment in the bankruptcy proceeding to his as- "signee, and that the latter, and not the original "claimant, was the proper person to sue in the "Court of Claims. 'The passing of claims to heirs, "devisees, or assignees in bankruptcy is not within "'the evil at which the statute aimed,' said the "Court. The language of the statute, 'all trans- "fers and assignments of any claim upon the "United States, or any part thereof, or any interest "therein,' is broad enough (if such were the pur- "pose of Congress) to include transfers by opera- "tion of law, of by will. Yet we held it did not in- "clude a transfer by operation of law, or in bank- "ruptcy, and we said it did not include one by will. "The obvious reason of this is that there can be no "purpose in such cases to harass the Government "by multiplying the number of persons with whom "it has to deal, nor any danger of enlisting im- "proper influences in advocacy of the claim, and "that the exigencies of the party who held it justi- "fied and required the transfer that was made."

Hobbs vs. McLean, 117 U. S., 567: In this case three persons formed a partnership, agreeing to bear the loss and share the profits in proportion to their contribution to its capital. One of the persons, at the time of the formation of partnership, had made a bid for a contract to furnish supplies of wood and hay to troops in Montana, and the partnership was formed with the purpose of carrying out this contract when made. Afterwards the contract was awarded to the bidder, his co-partners performed it. In a suit by the co-partners for an accounting, the Court held that they were entitled to recover on the ground that entering into a co-partnership agreement to perform

services for the Government was not an assignment of a claim. That it was not the intention of the Court to overrule, Spofford vs. Kirk, appears from the opinion of the Court:

"It is obvious that Section 3,477, which forbids "assignments of claims against the United States "or any interest therein, unless under the circum- "stances therein stated, can have no reference to "such a contract as the partnership articles be- "tween Peck and the plaintiffs. When those ar- "ticles were signed there was no claim against the "United States to be transferred. Peck had at "that time no contract even, with the United "States, and there was no certainty that he would "have one. What is a claim against the United "States is well understood. It is a right to de- "mand money from the United States. Peck ac- "quired no claim in any sense until after he had "made and performed, wholly or in part, his con- "tract with the United States. * * * * * * "One or both of the sections of the statute which "we are now considering have been under the re- "view of this court in the following cases: United "States vs. Gillis, 95 U. S., 407; Erwin vs. United "States, 97 U. S., 392; Spofford vs. Kirk, 97 U. S., "484; Goodman vs. Niblack, 102 U. S., 556; Bailey "vs. United States, 109 U. S., 432; St. Paul & Du- "luth Railroad Co. vs. United States, 112 U. S., 733. "In none of them is any opinion expressed in con- "flict with the views we have announced in this "case.

"Our conclusion, therefore, is that the articles of "partnership were not forbidden by the letter or "policy of this statute."

Freedman's Saving & Trust Company vs. Shepherd, 127 U. S., 494: In this case the facts are complicated, and a sufficiently comprehensive statement of them cannot be profitably

included in these points. Reference must be had to the case. But a careful examination of the statement of facts and of the opinion shows that it was decided on the same ground as Bailey's case. The head note reads: "When the Govern-"ment, as lessee of real estate occupied by it, recog-"nizes through its proper officers, the transfer of "the property and an assignment of the lease, and "pays the rent, there is nothing in Section 3,477 "Rev. Stat. respecting transfers and assignments "of claims against the United States which invali-"dates that transaction for the benefit of a third "party."

That the Court did not intend to overrule Spofford vs. Kirk by this case sufficiently appears:

First—The rental of real property, leased to the Government, where nothing is done by the lessor, is not recognized as a claim against the United States within the provisions of Section 3,477. The Court says: "We are of opinion that whatever "may be the scope and effect of Section 3,737, it "does not embrace a lease of real estate to be used "for public purposes, under which the lessor is not "required to perform any service for the Govern-"ment, and has nothing to do in respect to the lease "except to receive from time to time the rent "agreed to be paid. * * * * * * * * * * "Undoubtedly the lease made by Bradley to the "United States created in his favor what, in some "sense, was a claim upon the United States for "each year's rent as it fell due, and if the statute "embraces a claim of such a character, there could "not have been any valid transfer or assignment "of it in advance of its allowance, which could "have been made the basis of a suit by the assignee "against the United States, or which would com-

"pel the Government to recognize the transfer or "assignment."

Second—The Court further says: "It is per- "haps also true that under some circumstances the "assignor, before the allowance of the claim and "the issuing of a warrant, may disregard such an "assignment altogether." The circumstances here referred to can be no other than such as existed in the cases of U. S. vs. Gillis and Spofford vs. Kirk, which the Court cites with approval, and against the soundness of which nothing is said.

Third—The opinion of the Court so far as based upon the supposition that such a claim for rent is a claim against the United States, within the provisions of Section 3,477, rests wholly upon the circumstance that an assignment of the claim had been made before payment by the Government, and payment made without objection in pursuance of its terms, citing Bailey's case.

Fourth—The Court may have intended to hold that when any assignment of a claim has been made, and the Government has assented to such assignment, the statute no longer controls, but any further assignment or agreement in relation to the claim will be enforced between the parties.

Fifth—The ruling upon this branch of the case is based wholly upon special circumstances and cannot be taken as overruling well established cases cited with approval in the opinions of the Court, as well as in many later cases.

Jernegan vs. Osborn, 155 Mass., 207: This case, cited by the Court below, belongs to the

class of which Bailey's case is the first. The assignment had been made and the moneys paid over by the Government before the assignment was questioned. Chief Justice Morton says: "The "Government has paid over the money without ob- "jection to the defendant Osborn, as agent and "managing owner of the Europa. * * * * "Without undertaking to say that an assignor "might not, under some circumstances before the "allowance of a claim, disregard his assignment,

"we think the plaintiff cannot be permitted to in "this case. * * * * * It is very doubtful "whether the claim that was presented by the "owners which finally was recognized and paid by "Congress, came within the provisions of Section "3,477." A better authority upon this point is Newell vs. West, 149 Mass., 520.

In Becker vs. Sweetzer, 15 Minn., 427, a contest between private parties over a claim for supplies furnished to the Indians, the provisions of Section 3,477 were held to apply.

The provisions of Section 3,477 were never before construed by the Court of New York State, but the construction contended for by the plaintiffs in error has been recognized in

Stanford v. Lockwood, 24 Hun, 291.
Bowery National Bk. v. Wilson, 122 N. Y., 478.
Billings v. O'Brien, 45 How. Pr., 392–402.

IV.

Where an assignment has been made and payment made under it, it is then too late to invoke the statute. Assignments are to be treated as mere naked powers of attorney revocable at pleasure.

Bailey v. U. S., 109 U. S., 432.
Lopez v. U. S., 24 Ct. Clms., 84.
Buffalo Bayou River R. R. Co. v. U. S., 10 Ct. Clms., 238, 247.
Belt v. U. S., 15 Ct. Clms., 92, 110.

In Bailey vs. U. S., 109 U. S., 432, it is held, in an opinion by Mr. Justice Harlan, that payment to an attorney in fact, who has been constituted such befor the allowance of a claim by Congress or a Department, is as good as between the Government and the claimant, where the power of attorney has not been revoked at the time payment is made, notwithstanding the provisions of Section 3,477, and the Acts of which it is the successor.

This decision puts upon the owner of a claim the duty or obligation of repudiating an assignment before payment is made by the Government in pursuance of it. He cannot allow payment to be made to his assignee, then assert the invalidity of the assignment and collect again. The force of this decision, and the purpose and scope of the statute are comprehensively stated in an opinion by Judge Nott, in Buffalo Bayou R. R. Co. vs. U. S., 16 Ct. Cls., 238, 247.

"The statute as construed by the Supreme Court "in Spofford vs. Kirk, 97 U. S., 484, undoubtedly "operated upon this instrument so as to render it "wholly void. Nevertheless while Courts of the

"United States cannot give effect to such powers "or assignments so long as they remain unexecut- "ed, they cannot ignore consummated transactions "under them, by either permitting the assignor to "recover from the assignee the money paid him, or "by compelling the Government, whose officers "have acted on the faith of such an instrument, to "pay the debt a second time. The purpose of the "statute was not to protect individuals, nor to "regulate the business transactions of private per- "sons, but to protect the Government. The pur- "pose is well expressed in the title of the Act of "1853, 'An Act to prevent frauds upon the Treas- "ury.'"

"Our meaning will perhaps be made clearer by "a familiar illustration. A Statute of Frauds will "declare certain agreements absolutely void, and "no court of the country will be at liberty to en- "force them. Nevertheless, if two persons volun- "tarily enter into such a contract, and voluntarily "carry it into effect, the one party cannot sue for "and recover back the money which he may have "paid, and the other cannot sue for and recover a "higher price for the goods which he may have "sold, and no Court will be at liberty to undo what "the parties have themselves voluntarily done. "This statute to prevent frauds upon the Treas- "ury is of a nature of a statute of frauds. It was "designed to absolve the Treasury from all com- "plicity in, or responsibility for the sale or assign- "ment of claims until they had reached the point "where, in the forms of drafts they would be "merged in negotiable evidences of debt, and when "the amount being ascertained and fixed, the as- "signment or power of attorney could describe the "chose assigned with the most accurate exactitude "and certainty. At the same time the statute did "not forbid the officers of the Treasury from recog- "nizing or acting upon the instrument declared "void, nor did it declare the sale or assignment of "claims to be champertous, or penal. In a word "it left these assignments and powers of attorney

"precisely where the Statute of Frauds left "the agreements, which it declares void, "as instruments which cannot be enforced at law, "but which, when voluntarily given by the Gov- "ernment creditors and voluntarily carried into "effect by the defendant's officers, must be deemed "by all Courts to have expressed and executed the "true intent of the parties."

In Lopez vs. U. S., 24 Ct. Cls., 84, there is a careful review of all the cases decided by the Supreme Court of the United States. Chief Judge Richardson, writing the opinion, says: "The practical "effect of the law, thus interpreted, is that such as- "signments and transfers, whatever be the consid- "eration, are mere naked powers of attorney, re- "vocable at pleasure. Creditors may avail them- "selves of such instruments in order to have money "due them from the United States, paid to such "persons and in such manner as they may direct, "in like manner as they may transact business "with individuals, provided there be no contro- "versy, and the accounting officers see no grounds "for suspicion of fraud or other satisfactory reason "for refusing to recognize the transfers. But the "Government cannot be involved in controversies "between private parties."

In Belt vs. U. S., 15 Ct. Cls., 92, 110 (1879), a case of assignment of a claim for supplies furnished to an Indian agent, the Court says: "Belt & Co. "therefore had an undoubted right at any time be- "fore actual payment to repudiate their assign- "ment to Stewart, and this they did, when in Feb- "ruary, 1866, they brought this action to recover "upon the same claims in their own names."

It is clear also from an examination of the decisions that this statute is in its nature a statute of frauds, and that when there has been a full per-

formance under a void assignment, no one will thereafter be permitted to demand another performance; but, if before payment has been made, the assignment is repudiated, it becomes inoperative. It is revocable at pleasure, and revocable between the parties as well as between the parties and the United States. It is illogical to hold that the statute renders an assignment void as against the United States and valid between private persons. Such a ruling would lead to the payment of a claim by the Government to an original claimant when as between him and his assignee he was a stranger to it, and had no interest in it. If void at all, the assignment must be void altogether. The exceptions arising from bankruptcy, insolvency and death, illustrate and strengthen the rule. In such cases the Government recognizes the necessity of acknowledging the title of the assignee; otherwise there would be no one to whom payment could be made. The payment is always made to the owner.

V.

If prohibited by Statutes of the United States the assignment from Witherby & Gaffney gave no rights to the assignee under the laws of New York.

Sections 1909 and 1910 Code Civil Pro.

Section 1909. When the transferee or claim or demand may sue. Rights of the defendant, etc. Where a claim or demand can be transferred, the transfer thereof passes an interest, which the transferee may enforce by an action or special proceeding or interpose as a de-

fence or counterclaim, in his own name, as the transferor might have done; subject to any defence or counterclaim, existing against the transferor, before notice of the transfer, or against the transferee. But this section does not apply where the rights or liabilities of a party to a claim or demand, which is transferred, are regulated by special provision of law; nor does it vary the rights or liabilities of a party to a negotiable instrument, which is transferred.

Section 1,901. What claims or demands may be transferred. Any claim or demand can be transferred, except in one of the following cases:

1. Where it is to recover damages for a personal injury, or for a breach of promise to marry.

2. Where it is founded upon a grant, which is made void by a statute of the state; or upon a claim to or interest in real property, a grant of which, by the transferor, would be void by such a statute.

3. Where a transfer thereof is expressly forbidden by a statute of the State, or of the United States, or would contravene public policy.

VI.

The United States Court has jurisdiction to review the judgment of the State Court in this case, involving a right or title dependent upon the construction of Section 3477 U. S R. S.

To give jurisdiction it must affirmatively appear not only that a federal question was presented for decision, but that its decision was necessary to the

determination of the case, and that it was actually decided, or that the judgment rendered could not have been rendered without deciding it. California Power Works vs. Davis, 151 U. S., 389-393. Such a question is involved in the present case and is actually decided by the Court below (p. 5). The question passed upon was the validity of the transfer of the claim against the United States from Witherby & Gaffney to the defendants in error. The plaintiffs in error claim a title and right to the payment made by the United States under the transfer to them from the original claimants. This title has been defeated by the construction of Section 3,477 made below. The case is thus brought within the United States statute relating to the review of the decision of the State Court by the Supreme Court. (U. S. R. S. Sec. 709).

Butler vs. Goreley, 146 U. S., 303, resembles the case at bar. There the question was as to the ownership of a claim against the United States. The Supreme Court of Massachusetts held that a transfer of the claim was good, not being within the provisions of Section 3,477. The Supreme Court considered the writ of error and affirmed the State Court, no question being raised as to jurisdiction.

Where a plaintiff sued to recover a sum of money paid to his use by the United States, and also for moneys due him for work and labor, and the defense to the first count was that the assignment of the claim was void under Section 3,477, R. S. U. S., the Court of Appeals of Delaware refused

to disturb a verdict which did not specify under which count judgment was rendered. The case was taken to the Supreme Court, where the writ of error was dismissed on the ground that the only federal question in the case was not involved in the trial of the issue under the second count, and as the judgment could be sustained under the second count, the Supreme Court was without jurisdiction. (Delaware City & Navigation Co. vs. Reybold, 142 U. S., 636). Where the record showed that the plaintiff in error claimed in the State Court that the contract made with the defendant in error was void under the provisions of the Constitution of the United States, and certain Acts of Congress, and that the decision of the Supreme Court of Iowa denied the claim, a motion to dismiss the writ of error was denied. (Railroad vs. Richmond, 15 Wall, 3).

Where the provisions of the United States are invoked and the construction thereof involved, the Supreme Court has jurisdiction to review the decision of a State Court.

Matthew v. Zane, 4 Cranch, 382.
Ross v. Doe, ex dem, Borland, 1 Peters, 655, 664.
Buel v. Van Ness, 8 Wheat., 312, 317.
Rector v. Ashley, 6 Wall, 142, 147.
Carondelet v. St. Louis, 1 Black, 179, 188.
Lessieur v. Price, 12 How., 59, 73.
Aldrich v. Ætna Co., 8 Wall, 491.

Chief Justice Marshall says in Matthew vs. Zehn: "The third article of the Constitution, "when considered in connection with the statute, "will give it a more extensive construction than it

"might otherwise receive. It is supposed that the "Act intends to give this Court the power of ren- "dering uniform the construction of the laws of the "United States and the decisions upon rights or "titles claimed under those laws."

In Aldrich vs. Aetna Company, the question was whether a mortgage on a vessel to the defendant, duly recorded under an Act of Congress in the collector's office, gave a better lien than a subsequent attachment issued out of the Buffalo Superior Court in favor of the plaintiff. The construction of the Act of Congress was directly in question, and as the decision rendered was against the right claimed, the jurisdiction of the Supreme Court was sustained. In the case at bar, the construction of Section 3,477 was directly drawn in question, and the decision of the State Court was against the right which the plaintiffs in error claimed under the statute. The defendants in error claim that the assignment of Witherby & Gaffney to them is good, while the plaintiffs in error claim that it is void under the provisions of the statute. The statute is invoked by both parties, and under the cases cited, the Supreme Court has jurisdiction to review the judgment.

VII.

The judgment should be reversed.

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No. 143.

Brief of Purcell for D. C.

143

Filed Nov. 29, 1897.

IN THE SUPREME COURT

OF THE

UNITED STATES.

WILLIAM W. CONDE and JOHN C. STREETER, Plaintiffs in Error, ag'st ANSON E. YORK and WALLACE W. STARKWEATHER, Defendants in Error.	Points for Defendants in Error.

STATEMENT.

In error to the Supreme Court of the State of New York from a judgment entered on remittitur from the Court of Appeals of the State of New York, affirming a judgment upon an order of the Appellate Division of the Supreme Court of the Fourth Judicial Department of said State, which affirmed a judgment entered after trial at the Jefferson Circuit before Justice McLennan and a jury.

The action was brought in the Supreme Court of the State of New York to recover of the plaintiffs in error $2,500 in money, of which the defendants in error claimed to be the owners and which the plaintiffs in error had appropriated to their own use, and was first tried at the Jefferson Circuit in December, 1890. At the close of the evidence the Court directed a verdict for the defendants in error for the amount claimed, with interest. From the judgment entered on such verdict the plaintiff in error appealed to the General Term, Fourth Department, where the judgment was reversed on the ground that upon the evidence the question as to which of the parties had the prior assignment of the fund should have been submitted to the jury, and a new trial was ordered.

Reported N. Y. Sup. Ct Repts 61 Hun, 26.

Upon the second trial this question was submitted to the jury, and a verdict for the defendants in error for the full amount of the claim was rendered. An appeal was again taken to the same General Term, and the judgment was again reversed, on exceptions taken during the trial and to the Judge's charge.

Reported N. Y. Sup. Ct. Repts, 68 Hun, 316.

A third trial was had in March, 1893, which again resulted in a verdict for the defendants in error for the full amount of their claim, with interest.

The plaintiffs in error again appealed to the General Term, where the judgment was affirmed. From the affirmance by the General Term, they appealed to the Court of Appeals of the State of New York, where the judgment was affirmed. Opinion by Ch. J. Andrews, 147 N. Y., 486.

The several opinions of the Supreme Court and Court of Appeals are found in Appeal Book, p. p. 41-52.

STATEMENT OF FACTS.

In the year 1890, the firm of Witherby & Gaffney, of Watertown, N. Y., had a contract with the United States Government by the terms of which they were to furnish material and construct buildings known as "officers quarters" at Sackets Harbor, N. Y.

After this contract was let to Witherby & Gaffney, they purchased from the defendants in error, who were lumber dealers in Watertown, N. Y., under the firm name of York & Starkweather, large quantities of lumber and material for use in the erection of said buildings, and on March 27th, 1890, were indebted to the defendants in error on account of such materials in the sum of $3,000 and more, and on that day to secure the payment of the said sum they executed and delivered to the said defendants in error an instrument in writing, which is Exhibit 1 in this case, and fully set forth in the complaint, p. 8.

This instrument after reciting the fact of the contract with the government, the indebtedness to the defendants in error for materials used in the construction of said buildings, and that there would be moneys due from the government on the completion of the contract provided as follows:

"Now, therefore, of the moneys due and to be-
" come due us from said government, we do hereby,
" for value received, assign and transfer to said
" York & Starkweather the sum of $3,000."

The government's paymaster was directed by this instrument to pay $500 of the above sum to the defendants in error on the next estimate to be made and the balance of $2,500 on the completion of the contract.

On April 7th, Witherby & Gaffney paid the defendants in error $500 to apply on the said assignment, but no further payment was ever made by them.

It was admitted on the trial that Witherby & Gaffney executed and delivered the assignment, Exhibit 1, on March 27, 1890, to the defendants in error and that their indebtedness therein stated was correct, that a draft to the amount of $4,400 to which said assignment related was delivered by the government to Witherby & Gaffney on May 15, 1890, and by them delivered to the plaintiffs in error on that day, that while such drafts were in their hands defendants in error demanded $2,500 thereof and fully notified the defendants of the terms of said assignment, and that plaintiffs in error refused to pay the same or any part thereof (pp. 19, 20.)

It was also admitted that prior to the time plaintiffs in error received this draft they were fully notified of the assignment to defendants in error (p 20.)

The plaintiffs in error claimed a prior right to the draft and moneys in question by virtue of an alleged oral assignment thereof made to them by Witherby & Gaffney to secure the payment of certain notes upon which they were liable as endorsers and individual claims they held against them.

Upon the receipt of the money it was used to pay notes to the amount of $3,200 which plaintiffs in error

had endorsed, and individual claims to the amount of $600, and $628 thereof was returned to W. & G

On April 16th, 1890, Witherby & Gaffney executed to the plaintiffs in error an agreement by which they promised to pay off and discharge, from the moneys to be received by them from the government. certain notes endorsed by the plaintiffs in error, then held by the Jefferson County National Bank, and certain individual indebtedness held against them by the plaintiffs in error. This agreement, although appearing under date of April 18th (see case, p. 11) was in fact dated April 16th (case, p. 25). The change of the date is not material.

On April 18th, W. & G. made a written assignment to plaintiffs in error of sufficient of the moneys in question to pay the notes and claims mentioned. (Ex. 5, p. 22.)

PRELIMINARY.

The writ of error herein should be dismissed for want of jurisdiction.

(*a*) Under the Judiciary Act, Sec. 709 U. S. R. S., it is provided, that a final judgment or decree of the highest court of a state is open to review upon a writ of error, "Where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of * * * * the United States and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, &c."

The plaintiffs in error make claim to the fund in question by virtue of a transfer executed subsequent to the assignment of the same to the defendants in

error, and set up in their answer that by reason of Sec. 3477 of the Revised Statutes of the United States, the defendants in error, by virtue of their assignment, acquired no title to the fund. So, it will be seen that each of the parties to this record claim title to the fund by assignments to them respectively, made by the Government contractors.

The plaintiffs in error acquired no right or title to the fund by virtue of the section in question, and the decision of the Court of Appeals, as is said by Ch. J. Andrews, "does not affect any right of the defendants (plaintiffs in error) based thereon. Their right, if any, rests upon the transfer of the draft after it came to the hands of Witherby & Gaffney."

The most that can be said of the claim of the plaintiffs in error is, that the defendants in error never acquired any title to the fund by virtue of their assignment.

This claim does not draw into question the validity of the statute under consideration, nor any title, right, privilege of immunity claimed by the plaintiffs in error under such statute. The fact is they have, and can make, no right, title, claim or privilege to the fund in question under said statute, and the highest court of the State of New York so held, this court will not entertain the writ. This was the view taken of the case by the New York Court of Appeals, as we find in the opinion the following: "The judgment we shall render will not, we suppose, be subject to review by the Supreme Court. We do not question the validity of the section in question, nor will our decision affect any right of the defendants (plaintiffs in error) based thereon. Their right, if any, rests upon the transfer

of the draft after it came to the hands of Witherby & Gaffney. They seek to defeat the right of the plaintiffs (defendants in error) under their prior assignment of a portion of the fund and invoke Sec. 3477 to establish that the assignment was void and conferred no right."

(*b*) It is well settled that in order to give this court jurisdiction to review a judgment of a State Court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be one of the plaintiff in error, and not of a third person only.

> Owings vs. Norwood, 5 Cranch, 344.
> Montgomery vs. Hernandez, 12 Wheat., 129–132.
> Henderson vs. Tennessee, 10 How., 311.
> Gilles vs. Little, 134 U. S., 645–650.
> Ludeling vs. Chaffee, 143 U. S., 301.

All we have here are different claimants to a fund which was created by Government contractors, and the only real question that either could litigate in the courts of the State of New York or in this court was, who had the highest right or equity to such fund.

It is not enough that the statute was collaterally involved in the disposition of the case, as the true rule is that, in order to give this Court jurisdiction, it must be directly involved (Ch. J. Fuller, in Cook vs. Avery, 147 U. S , 385.)

(*c*) The rights of the parties to the fund in question were equitable only, and the equity and right of the defendants in error being superior to those of the plaintiffs in error, as decided by all the New

York courts, and this being really the only question involved, the writ should be dismissed.

Prairie State Bank vs. United States, 164 U. S., 227.

(*d*) While it is true that the State Courts in the disposition of this case passed upon the construction of Sec. 3477 of the Revised Statutes of the United States, we respectfully insist that this was wholly unnecessary and that the only question involved was which party had the prior assignment to the fund in question; and because the courts did so pass upon the construction of the statute if it was unnecessary to do so, and the case was finally disdisposed of, or could have been disposed of upon an independent ground not involving the construction of the statute, this Court will not entertain the writ, but will dismiss it.

Hammond vs. Conn. Mut. Life Ins. Co., 150 U. S., 633.

Conn, N. Y. & N E. R. R. Co. vs. Woodruff, 153 U. S., 689.

Eustis vs. Bowles, 150 U. S., 361.

O'Neil vs. Vermont, 144 U. S , 328.

Hammond vs. Johnson, 142 U. S., 73.

Wood Mowing & R. Mach. Co vs. Skinner, 139 U. S., 293.

(*e*) Although the writ of error granted by the Chief Judge of the New York Court of Appeals certifies that the construction of the statute under consideration was drawn into question, this statement is not binding upon this Court, and the Court will determine for itself whether such was the fact.

Newport Light Co. vs. Newport, 151 U S , 527.

POINTS ON MERITS.

I.

The main contention of the plaintiffs in error is that the defendants in error by virtue of their assignment acquired no right to the moneys to be earned by Witherby & Gaffney under their contract with the government, for the reason the assignment was absolutely void, it being prohibited by Section 3477 of the Revised Statutes of the United States. This Section is a re-enaction of an act of Congress approved Feb. 26, 1853, entitled "*an act to prevent frauds upon the Treasury of the United States,*" and declares in substance that all transfers and assignments thereafter made of any claim upon the United States, or any part or share thereof or interest therein, whether absolute or conditional, shall be absolutely null and void unless freely made after the allowance of such claim, ascertainment of the amount due and the issuing of a warrant for the payment thereof; and the case of Spofford v. Kirk, 97 U. S. R., 484, is relied upon in support of this position.

In that case Kirk was prosecuting a claim against the government through his attorneys for supplies furnished and damages sustained by the U. S. army and before its allowance made orders on his attorneys to different parties for certain of the moneys which he expected would be allowed him. The orders were endorsed by the payees and accepted by the attorneys, and then sold to Spofford for value.

Upon this state of facts the Court held that Spofford could not recover of Kirk who made the orders as the transaction fell within the prohibition of the

statute in question, and laid down the broad rule that the language of the Act was too positive and sweeping to justify a limited construction of it.

Since the decision of Spofford vs. Kirk, the same Court has had frequent occasions to pass upon this statute and *has* given a limited and qualified construction, holding in numerous cases that there are assignments of claims against the government which do not come within the prohibition of the statute and that the sole purpose of the statute was to protect the government, and not the parties to the assignment.

Erwin v. The United States, 97 U. S. R., 392.
Goodman vs. Niblock, 102 U. S. R, 556.
Baily vs. United States, 109 U. S. R, 432.
Hobbs vs. McLean, and al, 117 U. S. R., 567.
Freedman's Savings & Trust Co. vs. Shepherd, 127 U. S. R., 494.
Lawrence vs United States, 8 ct. claims, 253.
Milliken vs. Barrow (C. C) 65 F. 888.
Burke vs. Davis, (C. C) 68 F. 456.

(*a*) In Erwin vs. The United States, *supra*, the Court held that the statute did not embrace cases where there was a transfer of title by operation of law, that such cases were not within the evil at which the statute was aimed.

(*b*) In Goodman vs. Niblock, *supra*, it was held that the statute did not embrace the case of a general assignment by an insolvent for the benefit of his creditors. This case deserves especial attention as the Court evidently gave the statute a more extended consideration and arrived at a different, or at least a modified construction than that announced in Spofford vs. Kirk. The question arose upon a bill filed to reach trust funds in the hands of

an assignee. A demurrer was interposed which was sustained. An appeal was taken to the Supreme Court, and Justice Miller in delivering the opinion of the Court said: "It is understood that " the Circuit Court sustained the demurrer under " pressure of the *strong language* of the Court in " Spofford vs. Kirk. We do not think, however, " that the circumstances of the present case bring " it within the one under consideration or the prin- " ciples there laid down. *That was the case of the* " *transfer or assignment of a part of a disputed* " *claim then in controversy*, and it was clearly with- " in all the mischiefs designed to be remedied by " the statute. Those mischiefs, as laid down in " that opinion, and the other referred to were " mainly two.

" *First:* The danger that rights of the govern- " ment might be embarrassed by having to deal " with several persons instead of one and by the in- " troduction of a party who was a stranger to the " original transaction.

" *Second:* That by the transfer of such a claim " against the government to one or more persons " not originally interested in it the way might be " conveniently opened to such improper influences " in prosecuting the claim before the departments, " the Courts or the Congress as desperate cases " when the reward is contingent on success, so often " suggest.

" Both of these considerations, as well as a care- " ful examination of the statute leave no doubt that " its *sole purpose was the protection of the govern-* " *ment and not that of the parties to the assign-* " *ment.*"

There is no doubt, Judge Miller says, that the act is broad enough to embrace transfers of this character, *but such could not have been the purpose of the act*, thus showing a relaxation from the holding of Spofford vs. Kirk.

(c) In Bailey vs. The United States, *supra*, it was held that payment of a claim by the government to an attorney in fact of the claimant, before it was properly allowed was good as against the claimant, notwithstanding the provisions of the statute in question.

Justice Harlan, during the course of his opinion, says, in referring to the Erwin and Goodman cases, *supra*, "that these cases show that the statute in "question is not to be interpreted according to the "literal acceptance of the words used. They show "there may be assignments or transfers of claims "against the government," which are not forbidden by this statute; and he repeats the doctrine of Goodman vs. Niblock, which holds that the purpose of the statute was to *protect the government and not the claimant* in his dealings with it; and says that the title of the Act suggests the purpose for which it was enacted, namely: "An Act to Prevent Frauds upon the Treasury of the United States."

In the same opinion he questions whether in passing the Act of 1853, Congress had at all in mind the protection of claimants.

(*d*) In Hobbs vs. McLean, *supra*, the question arose as to whether persons who became co-partners with one for the purpose of performing a contract the one had or was about to receive from the government were entitled to receive any part of the

moneys earned in the performance of the contract. It was claimed by the assignee in bankruptcy of the person to whom the contract was let that the formation of the partnership by which it was agreed the incoming partner would be entitled to share in moneys received from the government was a violation of the statute and hence they were not entitled to any of the moneys.

The Court, in its opinion, says: "When the contract of partnership was made, Peck (the contractor) had no claim which he could present for payment or on which he could have brought suit. He therefore had no claim the assignment of which the statute forbids. It is so clear that the articles of partnership do not constitute such an assignment as is forbidden that it would be a waste of words further to discuss the point."

Further commenting on the statute in question and a similar one the Court held that the articles of co-partnership did not *transfer* the contract or any interest in it and could not fairly be construed to do so, but if open to two constructions the presumption is that they were made in subordination to the statute and if they could be construed consistently with the statute, it was the duty of the Court to so construe them under the rule that where a contract is open to two constructions, one lawful and the other unlawful, the former must be adopted.

After again stating that the statutes were passed for the protection of the government the Court say: "*Their purpose was not to dictate to the contractor what they should do with the money received on his contract after the contract had been performed.*"

(e) In Freedman's Savings & Trust Co. vs. Shepherd, and Sheperd vs. Thompson, 127 U. S., 404, it was held that an assignment or a pledge of a demand against the United States for use and occupation of real property, although a claim against the U. S., was not void within the statute in question, *as it was the gavernment and not the claimant that the statute protected.* The head note of this case, like the statement made of it in appellants' points, quite imperfectly digests it. A better digest of the same is found in the American Annual Digest for 1892, p. 726, and is as follows: "Where a de-
" mand for rent due from the United States is
" assigned as security before the claim has been
" allowed, the assignee may assert his rights against
" the persons named in warrants subsequently
" issued by the treasury department therefor, and
" against a mortgagee of the premises not entitled
" to the rents." The cases involved conflicting claims of a receiver, mortgagee, assignees and trustees to a considerable fund which arose from the rental to the government of certain real property, and which had been allowed by the government and exi-ted in the form of drafts to the order of the lessor, one Bradley, to the use of certain trustees designated by him. After the making of the lease and certain pledges and assignments of the rent, the lessor conveyed the property to one Sheperd, one of his trustees, who, it seems, was the equitable owner of the propesty, and who, with said Bradley, assigned the rents to one Thompson to secure the payment to him of an indebtedness in his favor against Sheperd. The trial Court (a Federal Court) passed upon the conflicting claims and awarded the fund that was represented by said

drafts to said Thompson. On appeal it was insisted that the assignment or pledge of rent to Thompson was in violation of the statute in question. The Court said: "When the government ascertained "the amount of rent due under Bradley's lease and "with his consent allowed the same . . . . . we "perceive nothing in the words or policy of the "statute preventing Thompson from asserting his "rights either against *the parties, or any of them, "named in the warrants issued by the government.* "The object of the statute was to protect the gov- "ernment and not the claimant and to prevent "frauds upon the treasury. The simple question is "whether the money received from the govern- "ment shall be diverted from the purpose to which "Bradley, Sheperd and Sheperd's trustee agreed in "writing it should be devoted, namely, the pay- "ment of the debts Thompson holds against Shep- "erd. This question must be answered in the "negative, and in so adjudging we do not contra- "vene the letter or spirit of the statute."

It will be seen that the principle involved in the case last cited is very similar to the one at bar. There the claims had been allowed and paid over and the controversy was between adverse claimants to it. Such is the precise fact here, and in this respect the cases are not distinguishable. It is true in that case that the government recognized the assignment (which it could not do if absolutely void) and paid over the money, while here no assignment was ever presented to it for recognition, but this difference in fact cannot change the legal principle involved. There the assignors had agreed in writing that the fund should go in a particular direction and the Court compelled them to keep their agree-

ment. Here Witherby & Gaffney, of the moneys to become due them, in effect agreed to pay the defendants in error for the very materials used by them for the government and then violated their agreement by paying the same to the plaintiffs in error. The language of the assignment does not in terms agree to pay the claim of defendants in error but we confidently submit that in law it amounts to an agreement to do so just as effectually as if it had been so written. On the whole the cases are alike and the decision considered should control here.

(*f*) In Lawrence vs. United States, 8 Ct. Claims, *supra*, it was held that the purpose of the Act must be restricted to matters before the U. S. Treasury.

The several cases cited show conclusively that all assignments of claims against the United States are not void, that the U. S Supreme Court has receded from the strong position taken in Spofford vs. Kirk, that the decision in that case was put upon the ground that the claim assigned was in controversy between the government and the assignor, that it was not intended by congress to hamper or restrain ordinary, legitimate business transactions between citizens, that the claims contemplated by the statute were those pending or which might be brought in the Court of Claims, or before the Treasury Department, and that its sole purpose was to protect the government and not the claimants.

Applying to this case the principles laid down in the decisions cited, it is insisted that the assignment to defendants in error in no sense violated the provisions of the statute in question.

II.

Passing from the Federal to State Courts we find that the construction of the statute for which we contend has been quite uniformly sustained.

Wallace vs. Douglas, 116 N. C., 659.
Forest vs. Price, 52 N. J. Eq., 16.
Leonard vs. Whaley, 91 Hun (N. Y. Sup. Ct.) 304.
Jurnegan vs. Osborn, 155 Mass., 207.

Attention is particularly called to the case in 155 Mass. which overruled Newell vs. West, 149 Mass., 520. The case involved the validity of an assignment of a claim against the United States government for services performed in rescuing seamen in the Arctic seas.

The assignor, after the assignment, learning that his claim against the government had been allowed, repudiated his assignment, relying upon the section of the Revised Statute in question, and in passing upon the case the Court said :

"The claim of the plaintiff that the assignment "is invalid under §3477 of the U. S. Rev. Sts., "would seem to derive some support from Newell "vs. West, 149 Mass,, 520. But in that case the "court relied in the main for this point upon Spof-"ford v. Kirk, 97 U. S , 484. The statute has since "been under consideration by the Supreme Court "of the United States in other cases. Goodman v. "Niblock, 102 U. S., 556. Bailey v. United States, "109 U. S., 432. Hobbs vs. McLean, 117 U. S., "567. Freedman's Savings & Trust Co. v. Shep-"ord, 127 U. S., 494. In Goodman v. Niblock, the "Court says that there is no doubt that the sole "purpose of the statute was to protect the govern-"ment and not the parties to the assignment.

" This language is cited with approval in Bailey v.
" United States, and the construction thus given to
" the statute is further upheld in Hobbs v. McLean,
" and more strongly still in the last reported case
" which deals with the subject, viz: Freedman's
" Savings & Trust Co. v. Sheperd. It is also said
" in Goodman v. Niblock that the mischiefs which
" the statute was designed to prevent were two:
" First, the embarrassment to which the govern-
" ment might be subjected by having several per-
" sons instead of one perhaps to deal with, and
" by the introduction of strangers to the trans-
" actions; and, secondly, the introduction into the
" prosecution of claims, often speculative and des-
" perate, before Congress and the departments, of
" the combinations and influences that might result
" from multiplying the number of persons inter-
" ested in them as owners. None of these consid-
" erations affect the present case. The government
" has paid over the money without objection to the
" defendant Osborn, as agent and managing owner
" of the Europa. The assignment by the plaintiff
" to him of his interest in the claim was for the
" purpose and as a part of a settlement between
" them of all matters relating to the ship and voy-
" age. Without undertaking to say that an as-
" signor might not, under some circumstances,
" *before the allowance of the claim*, disregarded his
" assignment, we think the plaintiff cannot be per-
" mitted to do it in this case."

Supplement the Massachusetts case by the lucid opinion in this case of Ch. J Andrews of the New York Court of Appeals and it would seem that the construction of the statute for which the defendants in error contend is well settled and should be up-

held. Indeed, we believe we might rest the argument of the case in behalf of the defendants in error upon the opinion alone of the learned Chief Judge.

(*a*) But was the instrument executed by Witherby & Gaffney to the defendants in error an assignment of any claim they had against the government? I insist it was not, that it was but an *assignment of the moneys* to become due them on their contract with the government. By this assignment the defendants in error acquired nothing they could present to or enforce against the government, and such never was the intention of the parties. Beside this, at the time the assignment was made Witherby & Gaffney had no claim they could present to the government, or upon which they could sue, hence within the case of Hobbs vs. McLean, supra, nothing was assigned so far as the government was concerned. The rights and equities of the defendants in error ripened only when the moneys were paid by the government to Witherby & Gaffney, and at that instant the fund to the extent of $2,500 became their property, the same as the fund in the Freedman's Savings & Trust Company, supra, case became Thompson's when it was awarded to Bradley. Upon the receipt of this money Witherby & Gaffney became simply trustees for defendants in error and the payment of it to and receipt by the plaintiffs in error were wrongful and unlawful.

It will be observed that no attempt was made to assign the contract of W. & G. or any interest in it, that there was no dispute between them and the government, and that the sole purpose of the transaction was to secure the defendants in error for material actually used by the contractors in per-

forming their contract with the government, and that the transactions between the parties really amounted to nothing more or less than the giving of security by a debtor to his creditor. This the Court will readily see and will not seek technical means to defeat a claim that is highly equitable; rather will it say that W. & G. had a right to assign the moneys to become due them in the future as such a course was upheld in Hobbs vs. McLean, supra, where it was said, "*the purpose of the statute was not to dictate to the contractor what he should do with the moneys received after the contract had been performed.*" The arrangements in this case between the contractors and the defendants in error can certainly admit of this construction, which is lawful, in preference to an unlawful one which would defeat a manifestly just claim The construction of the statute asked by the plaintiffs in error is altogether too narrow and cannot be sustained on principle or in the light of the recent decisions cited

The assignment in question directed the government's paying officer to make payments of the moneys coming to his hands on the contract of the defendant's in error, and for this reason it is argued that their as ignment amounted to a claim against the government, which they sought to collect through such officer. The paying officer was not the government, nor the Treasury Department, nor the Court of Claims, and the words added to the assignment are merely surplussage.

(*b*) If one could conceive how the defendants in error claim to the moneys to become due from the government after they reached the contractor's hands could be presented to and litigated before the

Treasury there might be some plausibility in the construction of the statute for which plaintiffs in error contend. As it was not the claim or the contract that was assigned, but the moneys due and to become due from the government, it is submitted that this assignment was not one that could be litigated before the Treasury, and hence does not fall within the probition of the statute.

Several cases in the Court of Claims are relied on by the learned counsel for the plaintiffs in error as holding the construction of the statute for which they contend, but it will be seen by the titles of each that there were claims in which the United States was named as a defendant, and it is not contended by the defendants in error that the government may not refuse to recognize assigned claims, but that it will not do so in cases like this is supported by abundant authority. Our real contention here is, that as between citizens who have acquired vested rights by their voluntary acts in claims which have allowed and over which there was no controversy, the courts never have allowed, and will not allow, the provisions of this act to intervene to divest such rights, and shield a party in the commission of a wrong. Moreover, several of the cases so reled on are authorities favorable to the defendants in error. Notably: Lopez vs. U. S., 24 Ct. Ch., 84; see also Dexter vs. Meggs, 21 Atlantic R., 114. The case of Newell vs. West, if on plaintiff's brief, 149 Mass., 520, has been overruled, as already shown.

We must not lose sight of the fact that neither the government nor the contractors are parties to the action, or that the action is between rival claimants.

The cases of McKnight against United States, 98 U. S. R., 171, and St. P. & D. R. R. Co. vs. United States, 112 U. S. R., 733, cited by the plaintiff's in error, were claims directly against the government and in this respect are distinguishable from the case in hand, and the concession is already made that the government may at any time refuse to recognize the assignment of any claim against it.

The later cases of Butler vs. Gorley, 126 U. S R, 303, and Hagar vs. Swayne, 149 U. S. R., 242, seem to some extent to be relied upon to overthrow the decisions of the New York Courts. It requires but a brief examination of these cases to show that they in no way interfere with Goodman vs. Niblock and other cases cited upon which the New York Courts relied. The case of Butler vs Gorley repeated what already had been held, to wit: that an assignment by operation of law to an assignee in insolvency was not within the prohibition of the statute; and the case of Hager vs. Swayne was an action brought by Swayne, who had become assignee of the claim, to recover from Hager as collector of the port of San Francisco, duties illegally collected by him. In the latter case Ch. J Fuller, in commenting upon the statute, goes no further than previous decisions went upon the same question.

(c) Since the decision of case at bar by the New York Court of Appeals, the cases of Prairie State Bank vs. United States, and United States vs. Hitchcock (164 U. S. R., 227) were before this Court and decided in November, 1896. The question there involved was whether the surety for a contractor with the United States, who was obliged to perform the contract of his principal, after he

had defaulted, in erecting a custom house at Galveston, or a bank which had received an assignment from the contractor on the faith of advances made by it of the fund that would finally become due from the government should receive the final payment for the construction of the custom house. The surety had no knowledge of the advances made by the bank, or of its authority from the contractor to receive the fund. Both the bank and surety by separate actions sought to recover the reserved sum from the government. The cases were heard together, and it was held that the rights of the parties to the fund were equitable only, and that the equity of the bank having been acquired subsequent to the liability incurred by the surety was subordinate to the surety's right, and he was allowed in equity to recover the fund.

The case is not unlike the present one in its equitable features. Here as there neither party could take an assignment of the contract or claim against the government, but could claim an equitable right to the fund after it had been created; and following well settled principles, the Court there held, as it will here, that the assignment first in point of time carried with it the first or higher equity to it. The case, I contend, is controlling authority, and one which will speedily lead to a decision of this case in favor of the defendants in error.

(*d*) There can be no claim made here by the plaintiff in error, Conde, that he became subrogated to the rights of Witherby & Gaffney in the fund in question. While Conde was one of the sureties to the bond of Witherby & Gaffney, he was not called

upon by the government to complete the contract, as was done in the Prairie State Bank cases cited, he was only an endorser with Streeter for the benefit of the contractors, and no claim to the right of subrogation has ever been and cannot now be made by him.

III.

Unless the statute stood in the way, it is not disputed that the instrument executed by Witherby & Gaffney to the defendants in error in equity transferred to them $3,000 of the moneys which they were to receive from the government. If authorities be needed for this proposition, see

Field v. The Mayor, 6 N. Y., 179.
Hutchins v. Hebbard, 34 N. Y., 24
Develin v. The Mayor, 63 N. Y., 8.
People ex rel Dannat v. Comptroller, 77 N. Y., 45.
Brill v. Tuttle, 81 N. Y., 454.
Jones v. The Mayor, 90 N. Y., 387.
Story's Equity Jur., §§ 1040, 1040b, 1055.

(*a*) And it makes no difference that the assignment was for moneys to become due or that the moneys assigned had not come into existence.

Taylor v. Bates, 5 Cow., 376.
Patterson v. Hall, 9 Cow., 747.
Morton v. Naylor, 1 Hill, 583.
Field v. The Mayor, 6 N. Y., 179.

(*b*) Witherby & Gaffney had no power to revoke the assignment or to change or interfere with the rights of the defendants in error under it.

DeForrest v. Bates, 1 Ed., Ch. 393.
Hutchins v. Hebbard, 34 N. Y., 24.

(*c*) No acceptance of such an assignment is necessary.

Ballou v. Boland, 14 Hun, 355.
Barse v. Morton, 43 Hun, 479.
Parker v. Syracuse, 31 N. Y., 376.

(*d*) The assignment was simply an ordinary business transaction, which is now sanctioned by law as well as equity as has already been shown.

(*e*) The action was properly brought to recover the amount unpaid on the assignment. During the progress of the case no question to the contrary has been made.

Fairbanks vs. Sargent, 104 N. Y., 108. And again 117 N. Y., 320.

IV.

This Court, we believe, will not examine the exceptions taken by the plaintiffs in error on the trial of the case, as the Supreme Court and Court of Appeals of the State of New York have passed upon them adversely to their contention.

The judgment should be affirmed with costs.

HENRY PURCELL,

Attorney and Counsel for Defendants in Error,

Watertown, N. Y.

CONDE *v.* YORK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 143. Argued December 6, 1897. — Decided January 3, 1898.

In order to give this court jurisdiction to review the judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be

Statement of the Case.

a title or right of the plaintiff in error and not of a third person only; and the statute or authority must be directly in issue. In this case the controversy was merely as to which of the claimants had the superior equity in the fund; the statute was only collaterally involved; and plaintiffs in error asserted no right to the money based upon it.

In September, 1889, Witherby and Gaffney entered into a contract with the Government of the United States to construct certain buildings at Sackett's Harbor, New York. Thereafter they purchased from York and Starkweather lumber and materials, which were used in the construction of the buildings, and on March 27, 1890, were indebted on account of these materials in the sum of more than $3000. Being so indebted, Witherby and Gaffney on that date executed and delivered to York and Starkweather an instrument in writing, as follows:

"Whereas we have a contract with the United States Government for the construction of buildings and officers' quarters at Madison Barracks, Sackett's Harbor, Jefferson County, N. Y.;

"And whereas we are indebted to York and Starkweather, of Watertown, N. Y., in the sum of three thousand dollars and more on account of materials furnished us by them that were used in said buildings and quarters;

"And whereas there will be due and payable to us on account of our work, etc., from the Government considerable sums of money before and on the completion of our said work;

"Now, therefore, of the moneys due and to become due us from the said Government, we do hereby for value received assign and transfer to said York and Starkweather the sum of three thousand dollars, and do hereby authorize, empower, request and direct Lieutenant J. E. Macklin, R. Q. M. Eleventh Infantry, U. S. A., through whom payments are made for such construction, to pay to said York and Starkweather on our account for such construction the full sum of three thousand dollars, as follows: First, $500 from the next estimate and payment due or to become due us, and the sum of $2500 on the completion of said work by us, and when the

balance of our contract with the Government becomes due and payable to us."

On the seventh of April, Witherby and Gaffney paid York and Starkweather $500, but no further payment was made by them. On May 15, 1890, Lieutenant Macklin, the disbursing agent of the United States Government at Sackett's Harbor gave a draft on the Treasury to the amount of $4400 to Witherby and Gaffney, which was turned over by them on that day to Conde and Streeter. Before Conde and Streeter received this draft, they had been fully notified of the paper delivered to York and Starkweather, and while the draft was in their hands, York and Starkweather demanded $2500 thereof from them, which they refused to pay or any part thereof. Conde and Streeter asserted a prior right to the draft and moneys in question by virtue of an alleged oral agreement with Witherby and Gaffney to secure the payment of certain notes upon which they were liable as indorsers and for individual claims they held against them. Conde was one of the sureties on Witherby and Gaffney's bond to the Government, and it seems to be conceded that Witherby and Gaffney obtained the money on Conde and Streeter's accommodation indorsements for the purpose of enabling them to carry on the work under the contract. Conde and Streeter applied the money to pay notes to the amount of $3200 which they had endorsed, and individual claims to the amount of $600, and about $600 was returned to Witherby and Gaffney.

April 16, 1890, Witherby and Gaffney executed to Conde and Streeter an agreement by which they promised to pay off and discharge from the money to be received by them from the Government certain notes endorsed by Conde and Streeter and certain individual indebtedness held by them against Witherby and Gaffney. On April 18, Witherby and Gaffney made a written assignment to Conde and Streeter of sufficient of the money in question to pay the notes and claims mentioned, in these words:

"That there may be no misunderstanding about the intention of the foregoing agreement, we hereby assign for value

received to John C. Streeter and Wm. W. Conde sufficient of the moneys coming to us from Lieut. Macklin, R. Q. M., to pay the claims as specified in the aforegoing agreement."

York and Starkweather brought suit against Conde and Streeter in the Supreme Court of New York for the county of Jefferson. Two defences were set up by Conde and Streeter, the second of which was "that the money, claim and property claimed by the plaintiffs in this action to have been assigned to them by Witherby and Gaffney at the time of the pretended assignment thereof, constituted and was a claim against the United States Government, which had not been allowed, or the amount due thereon ascertained, or the warrant issued for the payment thereof, and that the pretended assignment thereof does not recite the warrant for payment issued by the United States, and is not acknowledged by the person making the same before an officer having authority to take acknowledgments of deeds, and is not certified by such officer; and that said pretended assignment is in violation of the laws of the United States and of the State of New York, and that the plaintiffs never derived any interest in the said contract with the United States by virtue of the said pretended assignment or otherwise, and are not the real parties in interest in this action and ought not therefore to maintain the same; that said Witherby and Gaffney never transferred any interest in the said contract to the said plaintiffs."

The trial resulted in a verdict in favor of York and Starkweather, upon which judgment was entered, which was affirmed by the general term, and that judgment affirmed by the Court of Appeals. *York* v. *Conde*, 147 N. Y. 486. A writ of error was then allowed from this court.

Mr. Elon R. Brown for plaintiffs in error.

Mr. Henry Purcell for defendants in error.

Mr. Chief Justice Fuller delivered the opinion of the court.

Plaintiffs in error contended in the courts below that they were entitled to the fund in question by virtue of an oral

transfer prior to the assignment to defendants in error, and of the writings executed subsequently thereto; and that defendants in error acquired no right to the fund by their assignment because such assignment was in violation of section 3477 of the Revised Statutes of the United States. But they did not claim that they acquired any right or title to the fund by reason of that section, nor was its validity questioned in any way.

In delivering the opinion of the Court of Appeals of New York, its able and experienced Chief Judge said:

"The claim set up by the defendants in their answer, that prior to the assignment to the plaintiffs, Witherby and Gaffney had verbally assigned to them the money to become due on the contract, as security for their indorsements, was tried before the jury and found against them and need not be further considered. There can be no doubt that under the general rule of law prevailing in this State the plaintiffs, under the assignment of March 27, 1890, acquired an equitable, if not a legal, title to the money payable on the contract of Witherby and Gaffney with the Government to the extent of $3000, and that the defendants, having acquired possession of the draft for the final payment on the contract, by delivery from Witherby and Gaffney, to secure an antecedent liability, on being notified of the claim of the plaintiffs, held the draft and the fund it represented, as trustee of the plaintiffs, to the extent of their claim. *Field* v. *Mayor, &c.*, 6 N. Y. 179; *Devlin* v. *Mayor, &c.*, 63 Id. 8.

"But the contention is that the plaintiffs took nothing under the assignment to them, because, as is claimed, the transaction was void under section 3477 of the Revised Statutes of the United States, to which reference has been made. That section is as follows: 'All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed

in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same.'

"This section has been considered in several cases by the Supreme Court of the United States. If that court has construed the section so as to determine the point involved in this case we should deem it our duty to follow its decision. The judgment we shall render will not, we suppose, be subject to review by the Supreme Court. We do not question the validity of the section in question, nor will our decision affect any right of the defendants based thereon. Their right, if any, rests upon the transfer of the draft after it came to the hands of Witherby and Gaffney. They seek to defeat the right of the plaintiffs under their prior assignment of a portion of the fund, and invoke section 3477 to establish that the assignment was void and conferred no right. But on a question of statutory construction of an act of Congress which has been determined by the Supreme Court of the United States, subsequently arising in this court, we should feel bound to adopt and follow the construction of that tribunal on the principle of comity, although in a case where the ultimate jurisdiction is vested in this court."

Many decisions of this court in respect of section 3477 were then considered, and the conclusion reached that the section had been so construed as to permit transfers made in the legitimate course of business, in good faith, to secure an honest debt, while they might be disregarded by the Government, to be sustained as between the parties so far as to enable the transferees, after the Government had paid over the money to its contractors, to enforce them against the latter, or those tak-

ing with notice. The court held, in effect, that such was the transaction in the case at bar, and that the transfer to York and Starkweather was simply to secure them for material actually used by the contractors in performing their contract with the Government, and amounted to nothing more than the giving of security, and not to the assignment of a claim to be enforced against the Government. The United States had, in due course, paid over the money to the contractors, and between them there was no dispute; nor had the United States any concern in the question as to which of the rival claimants was entitled to the fund, the proper distribution of which depended on the equities between them. What the New York courts determined was that the equities of York and Starkweather were superior to those of Conde and Streeter, and judgment went accordingly.

In order to give this court jurisdiction to review the judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be a title or right of the plaintiff in error and not a third person only; and the statute or authority must be directly in issue. In this case the controversy was merely as to which of the claimants had the superior equity in the fund; the statute was only collaterally involved; and plaintiffs in error asserted no right to the money based upon it.

In *Aldrich* v. *Ætna Company*, 8 Wall. 491, the question was whether the mortgage of a vessel, properly recorded under an act of Congress, gave a better lien than an attachment issued under a state statute, and the decision by the state court was that it did not. The construction of the act of Congress and its force and effect as it respected the mortgage security under which defendants claimed a right or title paramount to that of the attachment creditor was necessarily directly involved, and a proper case for review existed.

In *Railroads* v. *Richmond*, 15 Wall. 3, in a suit on a contract defendants set up that the contract had been rendered void and of no force and effect by provisions of the Constitution of the United States and of certain acts of Congress, and

the decision of the Supreme Court of Iowa was adverse to that defence. The case being brought here, a motion to dismiss the writ of error was denied.

In each of these cases the defence was rested upon a title or right of defendants specially claimed under the Constitution or laws of the United States, and being adversely disposed of, jurisdiction obtained.

Here no such contention was put forward. The materials of plaintiffs below had gone into the buildings, while, on the credit of defendants, money had been raised for their construction. Both held written agreements, from the same source, for the money when paid over, but that of defendants below was subsequent in date to the other. Neither asserted any right under § 3477.

In *Walworth* v. *Kneeland*, 15 How. 348, it was ruled, where a case was decided in a state court against a party who was ordered to convey certain land, and he brought the case up to this court on the ground that the contract for the conveyance of the land was contrary to the laws of the United States, that this was not enough to give jurisdiction to this court under the twenty-fifth section of the Judiciary Act. The state court decided against him on the ground that the opposite party was innocent of all design to contravene the laws of the United States. Mr. Chief Justice Taney, however, said: "But if it had been otherwise, and the state court had committed so gross an error as to say that a contract, forbidden by an act of Congress, or against its policy, was not fraudulent and void, and that it might be enforced in a court of justice, it would not follow that this writ of error could be maintained. In order to bring himself within the twenty-fifth section of the act of 1789, he must show that he claimed some right, some interest, which the law recognizes and protects, and which was denied to him in the state court. But this act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of law. Such a contract, it is true, would not be enforced against him in a court of justice; not on account of his own rights or merits, but from the want of merits and good conscience in

the party asking the aid of the court. But to support this writ of error, he must claim a right which, if well founded, he would be able to assert in a court of justice, upon its own merits, and by its own strength. No such right is claimed in the answer of the plaintiff in error. . . . Neither can the writ of error be supported on the ground that Walworth was unable to purchase, at one dollar and twenty-five cents per acre, another portion of the land mentioned in the contracts, in consequence of its subsequent cession by the United States to the Territory of Wisconsin. Whether that cession, and the enhanced price at which it was held, absolved him from the obligation of performing any part of the contract, depended altogether upon its construction. The rights of the parties did not depend on the act of Congress making the cession, but upon the contract into which they had entered. And the construction of that agreement, and the rights and obligations of the parties under it, were questions exclusively for the state court; and over its decree in this respect this court has no control."

In *Jersey City & Bergen Railroad* v. *Morgan*, 160 U. S. 288, in an action brought in a state court against a railroad company for ejecting the plaintiff from a car, the defence was that a silver coin offered by him in payment of his fare was so abraded as to be no longer legal tender, and that defence was overruled. And a writ of error having been sued out by the railroad company from this court to review the judgment thereupon rendered against it, we held that the writ could not be maintained. It was there said: "The claim which defendant now states it relies on is that the coin in question was not legal tender under the laws of the United States. This, however, is only a denial of the claim by plaintiff that the coin was such, and as, upon the facts determined by the verdict, the state courts so adjudged, the decision was in favor of and not against the right thus claimed under the laws of the United States, if such a right could be treated as involved on this record, and this court has no jurisdiction to review it. *Missouri* v. *Andriano*, 138 U. S. 496, and cases cited. And, although denying plaintiff's claim, defendant did

not pretend to set up any right it had under any statute of the United States in reference to the effect of reduction in weight of silver coin by natural abrasion."

Writ of error dismissed.